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IN "OBSCENITY--SOME PROBLEMS OF VALUES AND THE USE OF EXPERTS," JOHN P. FRAN, OUTLINES THE LEGAL BASIS FOR DETERMINING OBSCENITY AND ANALYZES THE FUNCTION OF EXPERTS IN SUCH A DETERMINATION. AN EXPERIMENT IS DESCRIBED IN WHICH FOUR PROFESSORS OF LITERATURE AND TWO PSYCHOLOGISTS WERE ASKED TO READ SELECTED WORKS AND TO ANSWER QUESTIONS ABOUT THE OBSCENITY OF THE MATERIAL. THE CONCLUSION REACHED ON THE BASIS OF THEIR RESPONSES IS THAT, WHILE EXPERTS CAN DETERMINE THE LITERARY MERIT OF A WORK AND POSSIBLY THE INTENTION OF AN AUTHOR, THESE POINTS ARE OF LITTLE RELEVANCE IN DECIDING WHETHER OR NOT A WORK IS STRICTLY PORNOGRAPHIC. FRANK CONCLUDES BY DISCUSSING AN AREA WHERE EXPERT OPINION CAN BE OF VALUE--THE EFFECTS OF PORNOGRAPHY ON SOCIETY. ROBERT F. HOGAN, IN "OBSCENITY AND THE TEACHER--ANOTHER VIEW," TAKES UP THE UNIQUE PROBLEMS FACED BY TEACHERS OF ENGLISH AND PRESENTS THE VIEW THAT, SINCE PRNOGRAPHY CAN NEVER BE COMPLETELY ELIMINATED, ITS EFFECTS SHOULD BE MINIMIZED BY DEVELOPING MATURE RESPONSES IN PEOPLE THROUGH EDUCATION. (THIS DOCUMENT IS ALSO AVAILABLE FOR $1.00, ORDER NO. 20104, FROM THE NATIONAL COUNCIL OF TEACHERS OF ENGLISH, 508 SOUTH SIXTH ST., CHAMPAIGN, ILL. 61820.) (LH)

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TWO PAPERS BY JOHN P. FRANK AND ROBERT F. HOGAN

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NATIONAL COUNCIL OF TEACHERS OF ENGLISH
508 South Sixth Street
Champaign, Illinois 61820

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TWO PAPERS BY JOHN P. FRANK AND ROBERT F. HOGAN

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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PREFACE

Teachers of English share with others a concern lest the free exchange of ideas in school and college, no less than in American society as a whole, be restricted by irresponsible efforts to limit access to controversial books. They share with parents an obligation to help young people cope with ideas, distinguish the valid from the invalid, develop standards for discrimination. And they share the responsibility of introducing these readers to some of the great literary works of American culture, many of which present controversial ideas and images with all the richness and power of language that the great artist can command. The task of the English teacher is not an easy one, and the responsibilities are great.

During recent years, attempts to restrict the reading of young people have affected the teaching of thousands of school and college teachers. Widespread dissemination of inexpensive editions makes access to reading of all kinds, good and bad, a unique characteristic of contemporary society. With such wide reading has come rising concern about the prevalence of obscenity in much modern writing and, especially, with ways of coping with obscene reading material which seems inevitably to wend its way into the hands of youth.

To provide a rational basis for discussing such problems, the leaders of the NDEA Institute for Advanced Study in English held at the University of Illinois in 1966 invited John P. Frank, a specialist in constitutional law, to prepare a paper outlining the legal basis for determining obscenity in reading materials. Robert F. Hogan, NCTE Associate Executive Secretary, responded in terms of the unique problems faced by teachers of English. Their papers are reprinted in this monograph so that the discussion may reach a wider audience.

The authors offer little hope of easy solution. "No Superman," writes Mr. Frank, "will flash down from the clouds to solve this community problem." The framework for censorship established by the United States Supreme Court, carefully described by Mr. Frank, may assist a community in eliminating an unsettling problem, but, as Mr. Hogan writes, "Our protection lies not in sterilizing the world we live in, but in making the population immune to its most lethal dangers."

The value of this discussion is that it makes no attempt to simplify exceedingly complex issues. What is censorable obscenity? How can it be determined? What are the causes of present community concern? What are the obligations of teachers of English? John Frank and Robert Hogan address themselves to these issues, and the profession will find in their writing much food for thought.

James R. Squire, Chairman
Committee on Publications

Obscenity: Some Problems of Values and the Use of Experts

John P. Frank

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INTRODUCTION[1]

Recent decisions of the United States Supreme Court on obscenity start a new burst of thought on this well-worn theme. In part the Supreme Court has answered some questions. In part it has posed new questions. In part it has not touched at all on some of the fundamental values which must be appraised for sensible decision on legal control of obscenity.

It has been the practice for some time to use expert witnesses, particularly professors of literature, in the trial of obscenity cases. This was true in the recent decisions as well. The future use of experts in the light of the decisions is reconsidered here. While that topic may appear narrow, it necessarily touches on the whole theory of obscenity control. The function of the expert is to express opinions, and we must therefore determine what opinions he can be expected to express. This in turn requires the establishment of a standard of relevancy—his opinion must be relevant to an issue in the case. To know the issues, we must know the field.[2]

I begin with some only casually argued postulates in order to give a foundation for the remainder of the discussion.

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[1] This paper is an adaptation of a presentation to the University of Illinois Faculty Forum in October 1963. It also appeared in the August 1966 issue of the *University of Washington Law Review*. Since 1963 there have been notable developments, particularly the decisions of the United States Supreme Court on March 24, 1966, in *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. New York*, 383 U.S. 502 (1966); and *A Book, etc. v. Attorney General of Mass.*, 383 U.S. 413 (1966). These three cases will hereafter be identified as *Ginzburg*, *Mishkin*, and *Fanny Hill*, respectively.

[2] Numerous important books and articles are cited in the notes following. The bedrock, basic material on obscenity includes, first, the various works of Dean William Lockhart and Professor Robert McClure of the University of Minnesota Law School, which have been followed by the Supreme Court and to which all students are heavily indebted. These include *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295 (1954); *Obscenity in the Courts*, 20 *Law and Contemporary Problems* 587 (1955), essentially a condensation of the previously cited article; *Censorship of Obscenity*, 45 Minn. L. Rev. 5 (1960); and an individual address by Dean Lockhart, reported in 7 Utah L. Rev. 289 (1961), taken from the work of both.

Also basic is the Symposium in 20 *Law and Contemporary Problems* 531-688 (1955). In addition, Professor Louis Schwartz, Reporter for the relevant section of the Model Penal Code, has kindly furnished a current draft of the American Law Institute *Comment*. His views are more generally available in

Schwartz, *Moral Offenses and the Model Penal Code*, 63 Colum. L. Rev. 669 (1963). An especially thoughtful and useful concise case review is Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, and the cases are also reviewed in the Lockhart and McClure 1960 article, 13-47. Other more recent references of particular utility are Gerber, *A Suggested Solution* [etc.] 112 U. Pa. L. Rev. 834 (1964), and a note at 39 N.Y.U.L. Rev. 1063. For serious and very stimulating discussion of values, see Murphy, *The Value of Pornography*, 10 Wayne L. Rev. 655 (1964).

My own thinking has been particularly affected (partly by way of some dissent!) by Gellhorn, *Individual Freedom and Governmental Restraints*, Ch. 2 (La. S. U. Press, 1956).

The most recent case collections are notes on substance and procedure at 5 A.L.R. 3d 1158 and 1213 (1966).

PRELIMINARY PREMISES

A. *Obscenity has no tight definition; certainly this is true in 1966.*

We need a definition of "obscenity" to know what publications, if any, in this general class are subject to punishment. First-class minds have devoted first-class efforts to this definition for many years, and we must get used to their want of success. Obscenity may be defined either at some high level of abstraction or in functional terms, but this is a social problem which is not ever going to be reducible to some simple formula of the $A=\pi r^2$ variety. Not only is obscenity incapable of a mathematically precise definition; it is also incapable of definition with the precision of many a good, usable legal formula. A definition of burglary as breaking and entering in the nighttime for the purpose of committing a felony has a flatly tangible quality to it. There is going to be no equivalent in the law of obscenity.

This observation is no criticism. Many legal terms escape precise definition. The elusiveness of the definition of obscenity is no greater than that of due process of law, or burden on interstate commerce, or "flash of genius" in the field of patents. The imprecision of these terms only makes all the greater the challenge of solving the problems with which they deal.

The problem is no easier for the Supreme Court than for anyone else, and the nine Justices are pretty well divided.

1. Justices Black and Douglas take the view that no publication is obscene in the sense that its publication is punishable. Justice Black declines even to look at the material—to him the Constitution bars "any type of burden on speech and expression of ideas of any kind;"[3] and Justice Douglas says, "[T]he First Amendment allows all ideas to be expressed—whether orthodox, popular, off-beat, or repulsive."[4]

2. Justice Stewart would define "obscene" as "hard-core pornography." This in turn he defines:

> Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and

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[3] *Ginzburg v. United States, supra* note 1, 86 Sup. Ct. at 950.

[4] *Ginzburg v. United States, supra* note 1, 86 Sup. Ct. at 974.

> sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . .[5]

3. Justice Harlan would apply a double standard:

(a) So far as the federal government is concerned, he adopts the Stewart standard.

(b) So far as the states are concerned, he would give them much more latitude—they can suppress a publication by their own individual standards so long as they "reach results not wholly out of step with current American standards." He thinks it impossible and highly undesirable to be much more precise than this.

4. To Justice Brennan, as a spokesman for Chief Justice Warren and Justice Fortas, material is obscene if

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[6]

In this view, each of the three elements is independent; if for example the material has any social value, it is immaterial how much its theme appeals to a prurient interest or how offensive it may be.

5. Justices Clark and White, though not quite at one, very nearly agree. They accept the first two elements of the Brennan formula. The third, the social value factor, they consider not to be an independent

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[5] *Ginzburg v. United States*, *supra* note 1, 86 Sup. Ct. at 957. Justice Stewart has said that he may not be able to define hard-core pornography, but he knows it when he sees it, *Jacobellis v. State of Ohio*, 378 U.S. 184, 84 Sup. Ct. 1676, 12 L. Ed. 2d 793 (1964). This leads to a quip in the Los Angeles Bar Bulletin at p. 519, Kruger, *Fair Comment: What's All This—about Pornography*, 40 L.A. Bar Bull. 505 (August 1965): "I'll know it when Potter Stewart sees it."

[6] *A Book, etc. v. Attorney General of Mass.*, *supra* note 1, 86 Sup. Ct. at 977.

element but rather simply a factor in determining the dominant theme of the work.

The law of obscenity has been floundering desperately in need of a new idea; and in the recent cases, a new idea emerges. Clearly there is an element of relativity in obscenity; it may be illegal to sell hard-core pornography to the kiddies on a school ground and wholly proper to sell the same thing for discussion by the psychiatric class at a medical school. In *Roth v. United States*,[6a] Chief Justice Warren suggested a test of purpose—that an intent to pander to prurient interest may make the material, in context, obscene. What was an individual thought in 1957 has become the view of Justice Brennan, Chief Justice Warren, and Justices Fortas, Clark, and White. This is summarized in the context of the *Ginzburg* case thus:

> The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publication to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test.[7]

The same matter is more concisely put in another excerpt:

> Petitioners' own expert agreed, correctly we think, that "[i]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite," the work is pornographic. In other words, by animating sensual detail to give the publication a salacious cast, petitioners reinforced what

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[6a] *Roth v. United States*, 354 U.S. 476, 77 Sup. Ct. 1304, 1 L.Ed. 2d 1498 (1957).

[7] *Ginzburg v. United States*, *supra* note 1, 86 Sup. Ct. at 947.

is conceded by the Government to be an otherwise debatable conclusion.[8]

Faced with such divergencies on high, anyone who attempts to formulate a general rule can easily be wrong. But life cannot stop while the debate goes on, and there must be some usable generalizations.

1. Seven judges will apparently agree that "hard-core pornography" is obscene, with inevitable disputes over whether something is or is not "hard-core." There is, however, a general feeling that such stuff as is listed in Justice Stewart's definition is obvious.

2. Beyond this, anything to be obscene must meet all three elements of the Brennan test—prurience, offensiveness, utter lack of social value; and if it is merchandised in a salacious or pandering manner, doubts will be cast against it.

What, then, is "prurient interest?" The term is defined in a standard dictionary as "having lascivious longing," or relating to "desire, curiosity, or lewd propensity." Granted, as has been developed earlier, that there are some inherently necessary ambiguities and obscurities in the definition of "obscenity," this word needlessly complicates an otherwise hard situation; as Dean Lockhart says, it "gets us nowhere." A very large share of the sales literature of the United States—not only for the female undergarments and the perfumes, but for the hair oils, the manicure sets, the clothing, and even the automobiles—is calculated to appeal to the normal desires of normal people.

The American Law Institute *Comment* suggests the difficulty for obscenity controls "in a society like ours in which the female figure is commonly employed by advertisers to evoke interest, where perfumes and textures are widely touted for erotic effect, and where the pervasive theme of mass theatre, literature, and music is an eroticism that is obvious even while it fails to transgress the strictest obscenity law that could be envisioned."

The term is defined by the American Law Institute in context with its definition of obscenity. For this purpose, prurient interest is defined as a shameful or morbid interest in nudity, sex, or excretion and, in addition, as going substantially beyond customary limits of candor in describing or representing such matters.

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[8] *Ginzburg v. United States, supra* note 1, 86 Sup. Ct. at 947-48. For criticism of this view, see Gerber, *A Suggested Solution* [etc.], *supra* note 2, at 839: "It scarcely seems appropriate to make the profit motive, at least in this country, the difference between a crime and a lawful act."

The concept of obscenity has three vaguely contoured elements, subject to some overlapping.[9]

1. *Offensiveness.* This in turn divides into two areas, due to the unfortunate commingling under the one label of obscenity of both the scatological and the sexual. Borrowing Judge Woolsey's felicitous phrase, given matter may be emetic without being aphrodisiac.[10] Granting that the psychiatrists may find some connection between the two and that the same bodily organs may be involved in each, for most workaday legal purposes the distinction between the two needs to be fairly sharp.

(a) The community may feel that unduly detailed attention to excretion is offensive; and it may conclude that undue discussion of these bodily functions in terms of non-accepted descriptive words is also offensive.

This must be recognized as a nonrational community response; it will have to be accepted as a legally recognized and legally enforced tabu.[11] That is to say, a legislature probably could not validly make it a crime to describe in whatever detail and in whatever terms the emission of air or the emission of blood from the body. We recognize the special limitations concerning the discussion of excretion as traditional and accepted simply because the community finds this too offensive for common talk.

Offensiveness in relation to excretion involves only one-level offensiveness. That is, it is not the fact or act of excretion which is offensive, but only the act of talking about it or displaying it. It is the *publication*, not the *act*, which offends. This is so different from some problems of sexual obscenity as to make it only confusing to commingle them.[12]

(b) Offensiveness with relation to sexual conduct is two-level. Just as with excretion, the overly candid discussion of perfectly normal sexual activity may be offensive to the community even though the *act* under discussion is not offensive at all and is indeed wholly normal and essential to life. Yet, in the area of sexual obscenity, we deal also with a second level of offensiveness. Some forms of sexual activity are regarded by the community as offensive in the act itself. This is true of the perversions. Discussion of these acts is doubly offensive, first because the publication is offensive, and second because the act is offensive.

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[9] For a somewhat different statement of elements, substantially the same in effect with substantially different evaluations, see Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 937-39 (1963).

[10] *United States v. One Book Called Ulysses*, 5 F. Supp. 182, 185, *aff'd.* 72 F. 2d 705 (2d Cir. 1934).

[11] "The subject, by its very nature, includes a large element of irrationality." Chafee, *Government and Mass Communications*, 210 (U. Chi. Press, 1947). The extent to which nonrational community standards may properly be enforced is discussed in Schwartz, *Moral Offenses, supra* note 2, at 670-72.

[12] For distinction between the "filthy" and the "obscene," see Brandeis, J., in *United States v. Limehouse*, 285 U.S. 424, 52 Sup. Ct. 412, 76 L.Ed. 843 (1932).

Once again, we are dealing with social tabus which do not need a strictly rational basis and which have nothing to do with any clear and present danger.[13] They are reflections of custom, and indeed of changing custom; a Greek pastime may be today's perversion.[14] Moreover, the Kinsey Reports demonstrate that there may be class variance as to what is tabu and what is proper or normal; the law needs to be more sensitive than it usually is to the fact that its judges may be drawn from a class reflecting different values from those whom they are judging. In the views of Justices Harlan and Stewart, offensiveness is an essential independent element of obscenity.[15]

2. *Invasion of Privacy.* Our standards and notions of privacy directly overlap the problem of offensiveness. Here again, we are dealing with tabus so strong that the law has traditionally recognized them. With reference to the scatological, it is regularly and uniformly accepted that a person may perform some bodily functions in public and not others. At this point there is some overlap with sexual matters, so that, for example, a male may acceptably eat in mixed company but can acceptably only excrete the chemical residue of the same material in the presence of his own sex. This is of course due to the multiple purposes of the organs involved and relates to the problem of indecent exposure.

The larger part of the privacy problem is the overwhelmingly established belief that completely non-offensive sex acts should nonetheless be private. There is probably no single belief as to the privacy of any sort of conduct which is more universally accepted than this one. It follows that unduly candid talk about this activity directly strikes at this universally accepted standard of privacy.

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[13] I am extremely indebted for thoughts expressed here to Henkin, *Morals and the Constitution* [etc.] 63 Colum. L. Rev. 391 (1963). The tabu approach, common enough, of course, is particularly well suggested in Larrabee, *The Cultural Context of Sex Censorship*, 20 *Law and Contemporary Problems* 672 (1955). For argument to the effect of a relevance to "clear and present danger" see Kilpatrick, *The Smut Peddlers*, 219, *et seq.* (Doubleday & Co., 1960). For a legal analysis of "clear and present danger" and its relevancy, Lockhart and McClure, *supra* note 2, 1954 article, 363-87.

[14] The classic statement of the relevance of changing community tastes is Judge Learned Hand's in *United States v. Kennerly*, 209 Fed. 119, 121 (S.D.N.Y. 1913).

[15] *Manual Enterprises v. Day*, 370 U.S. 478, 82 Sup. Ct. 1432, 8 L.Ed. 2d 639 (1962), an opinion which illustrates, however, that these Justices have a remarkably liberal standard as to what is offensive. As Dean Lockhart puts it with vivid illustration, Address, *supra* note 2, p. 294, "The Supreme Court's concept of obscenity is a very narrow one."

It is only a partial answer to say that no one needs to read obscene works; that he who wants his privacy may keep it. This is simply not true of contemporary sex-merchandising, by which the community is engulfed with inducements to delight in this orgy or be shocked by that perversion. This accounts in part, I think, for the emphasis given by the Brennan opinions to the "pandering" or "merchandising" phases of obscenity.

3. *Social Values.* A third element in the Brennan definition is the factor of "redeeming social value." A singular lack in his discussion, to which we shall return, is the absence of serious discussion of the negative of the same thing—the "unredeeming social values" or the positive harm side of pornography. However, for preliminary purposes, we note:

(a) *Redeeming Social Value.* Justice Brennan's own definition is that "material dealing with sex in a manner that advocates ideas . . . or that has literary or psychiatric or artistic value or any other form of social importance" meets this test.[16]

(b) *Social Harm.* Wholly apart from its offensiveness or its invasion of privacy, many believe, though some deny, that obscenity may cause antisocial behavior. I shall come back to the pros and cons of this argument in a moment, but for purposes of this introductory statement of definitions, we note only that this phase of the problem relates only to the sexual branch of the subject. No one has suggested that scatological writing is likely to increase either the frequency or the public exposure of the functions with which it deals. But there is very serious suggestion that obscene sexual materials may increase the frequency either of perversion or of promiscuity.

B. *Obscenity is a parvenu in Anglo-American law, and its pendulum history has had the most serious consequences on its present state.*

It was a technical impossibility to be obscene in Chaucer's time. Obscenity is a violation of social tabus, and five hundred years ago those tabus did not exist with a sufficient degree of intensity or strength to make their violation criminal. It did not occur to the Church to render the angels of the Vatican modest by clothing them until Pope Paul IV drew the veil over the works of Michelangelo in 1558[17] and the Council of Trent in 1564 did direct restrictions at obscenity, but to little serious effect. The first reported English case said to involve obscenity is *Sydlyes Case* in 1663,[18] a matter involving the naked exposure of a drunken Lord Sydlye on a balcony from which he threw bottles containing urine at the passers-by; but while this may be treated as a precedent in the field of obscenity, it is better explained as a matter of disturbing the peace or of drunk and disorderly conduct.

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[16] *Jacobellis v. State of Ohio, supra* note 5, quoted in *Fanny Hill,* 86 Sup. Ct. at 978.

[17] Durant, *The Reformation*, 899 (New York, 1957).

The law of obscenity is to the history of social customs and social values as the law of theft is to the history of private property. There must be an institution of private property before there can be an offense of stealing it. Similarly there must be a strong community sense of the offensiveness or privacy of sexual activity and of the evil of promiscuity before there can be a body of law protecting those values; and this is what the law of obscenity seeks to do.[19] Such a scheme of social values did not exist in sufficiently dominating force to cause a body of law to arise to protect it until the eighteenth century in England, and it did not reach a real ascendancy until early in the nineteenth century.

In the eighteenth and nineteenth centuries, such a scheme of social values did arise and was commonly accepted. The law of obscenity flowed from it. The original general act in England is as recent as 1857,[20] and the first great case in the English courts, *Regina v. Hicklin*, was in 1868.[21] The first actual prosecution in England challenging a serious literary work, as distinguished from clear obscenities, was in the 1880's.[22]

What followed was a period of gross overprotection of the underlying social values. The first formal prosecution of a literary work may have been in the 1880's, but it followed almost a century of extreme public pressure. This was also true in America. Unquestionably the evils of Comstockery, as the bizarre overprotection of privacy was called after its principal exponent Anthony Comstock,[23] led to absurd results. From about 1830 to about 1930, a period which can fairly be described as a hundred years of minding other people's business, America was in the intense grip of a movement of social reform. Some of the results were benign—the abolition of slavery, women's suffrage, and the abolition of child labor, for examples. Others, which stemmed from the same moral forces, were distinctly less successful. Literary controls and Prohibition are salient examples.

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[18] 1 Kebel 620, 83 English Rep. 1146 (1663).

[19] "Criminal sanctions must be reserved for misbehavior that is quite generally recognized as a threat to individual security, and is therefore reprobated by common consent," *Comment*, *supra* note 2, p. 5.

[20] 20 and 21 Vict. C. 83.

[21] L.R. 3 Q.B. 360 (1868).

[22] For admirable history see St. John-Stevas, *Obscenity and the Law* (London, 1956). For less interesting prose but substantial additional historical detail, see Craig, *Suppressed Books* (World, 1963).

[23] For a thorough and genuinely funny account, see Broun and Leech, *Anthony Comstock, Roundsman of the Lord* (Albert & Charles Boni, 1927). The opening paragraph is, "he was eighteen when he raided a Connecticut saloon and spilled the liquor on the ground. At seventy-one he died as the result of 'over-doing in a purity convention.' Anthony Comstock led a life of eager adventure."

C. *We are now in a period of reaction to the censorship extremes, but in a period of counter-reaction as well.*

In our reaction against Comstock, we have very nearly totally abandoned any legal protection of the underlying social values and standards.[24] In our flight from the Philistines we have embraced the pornographers.[25]

One underlying problem is the large-scale prevalence of clear obscenity. Much of the material under serious challenge in our own day is not what may be the literary work of the century; it is the plainest and crudest kind of pornography; this is what Justice Stewart talks of as hard-core pornography, and, as he suggests, it would be so evaluated by virtually anyone who looked at it.

The rise of an immense, low cost paper book trade radically alters the general problem, permitting an absolute flood of material.[26] The items in the Stewart definition—the comic books or other pamphlets—are instances. But ease of reproduction also permits the immense and cheap multiplication of sleazy works just one notch superior to what Justice Stewart regards as hard-core pornography. This is well documented in the *Mishkin* case, which describes the manner in which the smut publisher devised fifty booklets, specializing in deviationist activity. These were written by a stable of writers given instructions to "make the sex sense very strong" with as much Lesbianism and homosexuality as possible, all garnished with a good coating of torture and abuse. These were then rolled out by a photo-offset printer paid fifteen or forty cents a copy, depending on whether it was a thick or thin book. The resultant product was large enough and cheap enough to stock an industry.[26a]

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[24] More gently, Chief Justice Warren observes in this connection that "mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments." *Roth v. United States, supra* note 6a, 77 Sup. Ct. at 1314.

[25] The Philistines may be in close pursuit; see the minority report of Congressmen Celler and Walter, *Report of the Select Committee on Current Pornographic Materials,* H.R. 2510, 82d Cong., 2d Sess. (1952) (Gaithings Report), p. 123, *et seq.,* charging the majority with imposing "arbitrary literary standards." *Life Magazine,* Sept. 27, 1963, p. 8, observes editorially that "There is danger that if our courts become too permissive, a public reaction will bring Comstock roaring back from his grave." On the other hand, for a collection of the idiocies of censorship, see the opinion of Chief Justice Warren in *Times Film Corp. v. Chicago,* 365 U.S. 43, 69-73, 81 Sup. Ct. 391, 5 L.Ed. 2d 403 (1961); Gellhorn, *Individual Freedom, supra* note 2, Ch. 2; Lockhart and McClure, *supra note* 2, 1965 article, with trashy and good examples, 316-20. For a review of more recent specific problems, see the same authors, *supra* note 2, 1960 article, 6-13.

[26] For discussion of the paperbound books, see Lockhart and McClure, *supra* note 2, 1954 Article, 302-16.

A challenge to our legal institutions is whether we can devise a legal procedure capable of distinguishing between a *Ulysses* or a *Strange Fruit* on the one hand and plain pornography on the other. As Professor Kalven puts it, "There seems to be no way to phrase a formula that will reach the [French] postcard and leave Molly Bloom's soliloquy in *Ulysses* or the Song of Songs unscathed."[27] If the materials did in fact fall clearly and easily into only those two categories, there probably would not be much problem; as has been noted, it is not really very difficult for anyone to tell the difference between *Ulysses* and a book of locker room cartoons. But there is an immense gradation, as is illustrated in the grubby pulp of the *Mishkin* case. At this moment in our legal history, we are floundering in an effort to separate this endless mass of published material into the acceptable and the non-acceptable. Every aspect of the problem is made more difficult by the rapid change in the nature of what is being published. One popular book reports a study contrasting the volume of sex references in publications, television, radio programs, plays, books, and other sources between 1950 and 1960. The ten-year comparison shows "2-1/2 times as many references to sex in 1960 as in 1950, an increase from 509 to 1341 'permissive' sex references in 200 media studied." There is also a significant shift in the object of sex-orientated publications from the traditional locker room to the contemporary living room. The author observes that "the most striking new sexual phenomenon, however, was the increased and evidently 'insatiable' lasciviousness of best-selling novels and periodical fiction, whose audience is primarily women."[27a].

[26a] Vidal, *On Pornography, The New York Review*, March 31, 1966, p. 4, col. 1, at 5, col. 1:

> Until recently, pornography was a small cottage industry among the grinding mills of literature. But now that sex has taken the place of most other games (how many young people today learn bridge?), creating and packaging pornography has become big business . . .

[27] Kalven, Book Review, 24 U. Chi. L. Rev. 769, 773 (1957).

[27a] Friedan, *The Feminine Mystique*, 251 (Dell, 1964), quoting and summarizing from Ellis, *The Folklore of Sex*, 123 (New York, 1961).

THE FUNCTION OF EXPERTS

A prime development in the law of obscenity during the past forty years has been the creation of a role for experts to help determine whether given material is or is not obscene. The theory is of a peer approach—let authors be assessed by authors, artists by artists. This impulse has essentially been a product of three things:

1. Comstock was worse than a prude, he was a fool. Moreover, the persons inclined to concern themselves with this business are likely to be fools or incompetents. They may be citizens' groups, the members disturbed themselves, with an obsessive interest in salacious materials. They may also, without being eccentrics, be simply incompetent. Judgments on these matters are frequently lampooned—the dumb policeman reading his first book and trying to decide whether it is fit to go into the homes of the community is an easy and tempting target, partly because he deserves to be. He is too easy and too tempting because as a practical matter he may not be dumb at all. He may be a very sincere and very dedicated policeman who honestly wants to do his job and who is simply unequipped to handle this one. Vice squad members for whom I have had the highest personal respect as officers and as gentlemen, honestly dedicated to public service, have told me that in this area they simply do not know. Hence the call for experts to give them help.

2. High level judges and administrators may have the same problems. In the marginal cases, the issue of obscenity may be genuinely difficult. Of the material challenged as pornographic, 90 percent may be so clearly in that category that no reasonable men can differ about it; Thurman Arnold, a close student of the problem, has pungently suggested that the best solution for the whole difficulty is simply to let someone stack the challenged literature in Yes and No piles without attempting to reason about it at all.[28] For the overwhelming weight of the material, this would be quite adequate. But while 90 percent of the material may present no problem, 90 percent of the problems come from the rest of the material.

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[28] Judge Arnold's views are quoted at length in Kalven, *Metaphysics of the Law of Obscenity, supra* note 2.

These can be honestly difficult. The best of judges are not likely to be terribly well informed in the field of literature.[29] Judge Woolsey, confronted with the case of *Ulysses*, is entitled not only to respect for his disposition of it but also to all sympathy for the difficulties before him. In short, like the honest policeman, the honest judge may want and benefit from expert help.

3. If I were to select, from among the many wise and thoughtful men who have given deep thought to this subject, the one man who has had the greatest experience with it, my choice would be Mr. Huntington Cairns. Mr. Cairns for many years was Assistant General Counsel of the Treasury Department. He is also Secretary of the National Gallery of Art and was well described as "an enlightened connoisseur of the arts and literature." During his years at the Treasury Department, he was able in about an hour a week to review the doubtful Customs or import cases, advising as to what should come in and what should stay out. Mr. Cairns performed this function to such universal satisfaction that, while he rejected immense quantities of material as pornographic, no one ever appealed one of his rulings. In his hands, an administrative system in the Customs Service which had been an endless series of absurdities and international embarrassments became wholly satisfactory.

We had a superman in Mr. Huntington Cairns, and the country liked it. Mr. Cairns was himself a very great expert on both art and literature, although in the doubtful cases he developed the practice of consulting other experts.[30] For illustration, the question of whether so-called "scientific literature" is really serving some purpose of medicine or whether it is simply fodder for the trade in eroticism was a matter he might not wish to decide himself. As a kind of a superman in the field, Mr. Cairns made experts highly respectable.

The result has been the increasing utilization of experts in obscenity cases.[31] An English statute now provides for their testimony. Massachusetts, tired of the embarrassment of jokes concerning its administration in these matters, adopted an obscenity statute which also called for free use of experts.[32] The American Law Institute now proposes in its Model Penal Code,[33] which will doubtless be widely adopted throughout the United States, that "expert testimony and testimony of the author, creator, publisher or other persons from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissable." In current prosecutions, experts are commonly being called, and the various opinions in the recent cases refer to them freely; in a lone concurrence, the late Justice Frankfurter seemed to believe that their use, if desired by the defense, is constitutionally required.[34]

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[29] As Justice Douglas says in *Fanny Hill*, "We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except as in our capacity as private citizens." 86 Sup. Ct. at 981-82.

[30] *Monograph of the Attorney General's Committee on Administrative Procedure*, part 14, S.D. 10, 77th Cong., 1st Sess., (1941), quoted in Chafee, *supra* note 11, at 254.

[31] The incidents are legion. For an account of expert testimony in the *Hecate County* case, see Lockhart and McClure, *supra* note 2, 1954 article, at 298.

We therefore come to the question of the identification, purpose, and function of these experts. What kind of experts? What shall they be asked when they are on the stand? What weight is to be given to their conclusions? In short, what is their job?

We may approach the topic in a questioning but not a hostile spirit. As every lawyer knows, while experts are not exactly a dime a dozen in price, the dozen can be had on all sides of most questions. Moreover, the tradition of the experts themselves is not such as to give us absolute confidence in their judgment on the ultimate question in issue in an obscenity case. The establishment normally tends to the conservative, and there have been some appalling examples of expert misjudgment. The Academy in France refused to hang Manet's "Luncheon on the Grass" on the grounds of indecency, a judgment which in retrospect seems even odder than the choice of costumes made by the artist in that particular work. Persons who would qualify as experts violently attacked as obscene Thomas Hardy's *Jude the Obscure;* Ibsen;[35] Shaw, whose *Mrs. Warren's Profession* was not performed publicly until 1925, twenty-three years after its first private performance; and of course Zola. Tennyson, surely an expert and one who was on occasion attacked himself, poetically denounced Zola for feeding "the budding rose of boyhood with the drainage of your sewer." The list is long—Balzac, Flaubert, and Wilde are included, and Swinburne bore the worst attacks of all.

The experts are thus demonstrably capable of being Philistines, too. Dickens declined to appear as a literary expert in behalf of fellow author

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[32] Mass. Ann. Laws ch. 272, 28F (recompiled 1956).

[33] Sec. 251.4.

[34] *Smith v. California*, 361 U.S. 147, 164-65, 80 Sup. Ct. 215, 4 L.Ed. 2d 205 (1959). For some purposes, Lockhart and McClure, *supra* note 2, 1960 article, p. 91, think them "indispensable," a thought further developed by them with constitutional emphasis at 98; and see 5 A.L.R. 3d 1194-95.

[35] For an extensive series of contemporary responses to Ibsen's *Ghosts*, of which "naked loathsomeness" is typical, see excerpt from Shaw, *The Quintessence of Ibsenism*, in Levin, *Tragedy* (Harcourt, Brace & World, 1960).

George Reade because "what was pure to an artist might be impurely suggestive to inferior minds."[36] Even more commonly, literary experts are quite capable of being pretentious or foolish. Justice Clark rightly makes a frightful hash out of some of those who rallied around, pumping literary merit into *Fanny Hill* in the current cases.[37] At the same time, for all the limitation of the expert system, the policeman who triggers off the prosecution at the bottom of the line does need help. There are judgments to be made in at least some cases which involve something more than a look at the challenged object and spontaneous reaction by the judge or jury.

To explore the use of experts, I have attempted a modest experiment by presenting selected materials to experts along with questions. The terms of the experiment have been these:

A. *The Materials.*

The experiment covers six pieces of printed work:

1. *Fanny Hill*: This is a volume published originally in 1750 in England, describing the careers of a common prostitute. It is described by Mr. Cairns "as the first deliberately pornographic novel in the English language."[38] The volume includes great detail as to how the lady and her friends conducted their trade and is fairly fully though restrainedly summarized by Justice Clark in his opinion in the current cases.[39] This book, in 1963, had recently been published by Putnam. I included it at that time, three years before the Supreme Court's recent opinion concerning it, because, while I regarded it as clearly pornographic, it puts the problem of a work presented by a generally respected publisher, nicely turned out, and with at least a touch of claim of historical value as a reflection of the life of a distant time.

2. The second sample is Henry Miller's *Tropic of Cancer*, a work formerly banned but now fairly commonly available in the bookshops of the United States. I include it because it makes serious claims of being a very genuinely significant, albeit tedious, literary work.

3. The third item I shall define, without thereby meaning to denigrate the paper book trade, as a slightly more than salacious paperback.

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[36] Most of the examples are taken from St. John-Stivas, *supra* note 22, Ch. III.

[37] *A Book, etc. v. Attorney General of Mass.*, *supra* note 1, 86 Sup. Ct. at 991-93.

[38] Cairns, *Freedom of Expression in Literature*, 200 Annals of the Am. Acad. Pol. & Soc. Sci. 87 (1938).

[39] See note 37 *supra*.

It purports to be a historical novel dealing with the life and peculiar sexual experiences of the Emperor Nero. It is completely devoid of literary merit, a bit of sleazy junk, and has no historical accuracy. The episodes consist of a series of mixed beads of sexual experience, normal and abnormal, and sadism strung together upon the faintest wisp of a plot. The volume is a sample of what is commonly available now in low quality bookshops throughout the United States.

4. The next item is a fairly extreme example of a so-called "girlie type" magazine, purchased in a dingy book store without difficulty or question and without high price. It also is a sample of a universal product. The pictures are rather more determinedly suggestive than the prose, which includes stories and articles carefully calculated to be salacious and suggestive without, however, the detail of *Fanny Hill*.

5 and 6. These two items are samples of what anyone would regard without question as hard-core pornography.[40] Item 5 consists of a mimeographed story, miserably written, of the sexual experiences observed or experienced by the protagonist. A type of material not commonly available in bookshops, it is of the sort seen in locker rooms or likely to be handed about on occasion among high school boys. A series of detailed descriptions of sexual activities, it differs from *Fanny Hill* in two essential respects, other than age: first, it is very poorly written, and second, it is physically grubby, not nicely published or handsomely turned out.

The last item is a group of cartoons involving familiar comic strip figures engaged both in normal and perverted sexual activities.

B. *The Experts.*

Two panels, each of three experts, have reviewed the materials. One panel has been drawn from Arizona State University at Tempe and one from the University of Illinois at Champaign-Urbana. Each panel includes two professors of literature and one psychologist. Since the names are immaterial, I shall identify the four professors of English in the order of the two universities named as Experts 1 through 4 and the two psychologists as Experts A and B. Each would unquestionably be accepted as a qualified expert in any trial arising in their respective areas or, indeed, in any part of the United States—they are a genuinely distinguished group.

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[*] For technical discussion of hard-core pornography and psychological analysis, see the superb discussion by Dean Lockhart, Address, *supra* note 2, 296-302, and 1960 article, *supra* note 2, 58-68.

Professor 1 has his B. A. in the classics, his M. A. in comparative literature, and his Ph. D. in English. He has been a professor of English for more than twenty-five years and is widely regarded by his fellows and by the community as truly distinguished in his field. Professor 2 has a Ph. D. in classical literature from one of the country's great universities and for five years was head of the English department of a large university. This expert has produced some significant scholarly translations. Professor 3 also has a Ph. D. in English and has many years of teaching experience at both the undergraduate and graduate levels. Professor 4 holds the usual three degrees and has specialized in eighteenth and nineteenth century English literature with a minor in comparative literature. He has published numerous articles and is a consultant to a national educational group.

Psychologist A has a Ph. D. in clinical psychology and is a Diplomate in the American Board of Examiners in Professional Psychology. He is director of a psychological clinic and has often qualified as an expert in legal proceedings, at which he is one of the ablest expert witnesses I have ever seen in any field. Psychologist B is well trained with all the academic trappings and is the director of an important university program immediately relevant to the broader aspects of this problem, which position he could not hold except as an esteemed expert.

C. *The Questions Presented.*

Answers were needed and the questions were presented in 1963, prior to the most recent legal developments. Hence the questions do not fit perfectly the most recent cases, although they come very close. The questions put to the experts of course do not go into the detail possible upon oral examination and must be regarded as a sort of written deposition or interrogatory.

There were nine questions:

1. Assuming your own definition of literary merit, does this writing have literary merit?

This question was intended for the professors of literature. As will be developed below, there is some confusion as to the precise relevance of this to the subject at hand, but in any case it is assumed to be a proper question for a literary expert.[41]

2. Do you believe that to the average person, applying contemporary community standards, the dominant theme of the mate-

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[41] A foremost instance of acceptance of literary standards is *Halsey v. New York Soc. for Suppression of Vice*, 234 N.Y. 1, 136 N.E. 219 (1922).

> rial taken as a whole appeals to a prurient interest, defining this as a tendency to excite lustful thoughts?
>
> 3. Do you believe that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest, defining this as a shameful or morbid interest in nudity, sex or excretion and, in addition, as going substantially beyond customary limits of candor in describing or representing such matters?

This is the definition as given by the American Law Institute.[42] It is far clearer than the Supreme Court's definition and yet may well be the same thing. The Supreme Court itself has said that its definition is intended to be a shorthand for the American Law Institute's longer statement.[43] The difficulty lies here in the circumstance that the professor of literature and the psychologist must, within the scope of their expertise, divide this question. Presumably the psychologist has an opinion worth having as to whether the given material appeals to a "shameful or morbid interest in nudity, sex or excretion," while the opinion of the professor of literature on this score is not much better than that of any well-informed person. On the other hand, the professor of literature is better qualified than the psychologist to express a view as to whether the writing goes "substantially beyond customary limits of candor" since the psychologist might very well not know what those customary limits are.

The excellence of this ALI definition is that it frankly recognizes and operates from the fundamental tabu hypothesis on which the whole law of obscenity is built. Since a key element in the definition is whether or not the material is offensive, a definition in terms of "customary limits" becomes a fair measure of what is offensive.

> 4. A leading commentator described pornography as material as to which "the purpose is to stimulate erotic response, never to describe or deal with the basic realities of life." Assuming this to be a valid proposition and applying it to the material at hand, do you regard this material as pornographic?
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> 5. The same commentator has suggested as an alternative test, material as to which "the purpose is to stimulate erotic response,

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[42] Model Penal Code, Sec. 251.4.

[43] In *Roth v. United States*, *supra*, note 6a, the Court, in giving its definition in a footnote, expressed agreement with the American Law Institute's definition, but there has been severe doubt as to whether the two are really co-extensive. The American Law Institute's own doubts are expressed politely in *Comment*, *supra* note 2, 9, by Dean Lockhart in Address, *supra* note 2, 291-92.

> never to describe or deal with the basic realities of life, in a manner which is patently offensive to current community standards." Is your result any different if this limitation is added, and if so, how?[44]

These and the next two questions introduce a new element into the problem, one which seems to writers and artists the most important of all. This is the question of the intent with which the work is done. In this view, acceptability depends upon whether the creator of the material was in fact seriously seeking to create a work of art or literature; and it is fairly well accepted that this can be evaluated by an expert. As Mr. Cairns puts it,[45] "There is no difficulty in distinguishing between those books the impulse behind which is literary and those whose impulse is pornographic. Any man with a modicum of literary knowledge can do so without hesitation." Art, as he says, "has its own morality, its own integrity."[46]

The relevance and proper weight to be given to intent is discussed below; but assuming it to be relevant, it is the proper business of the literary experts to evaluate it. I doubt that the psychologists have anything of great importance to contribute here, although perhaps their powers of diagnosis reach to hidden motives.

> 6. Does the work appear to you to be a work of serious intent as distinguished from being merely a kind of pandering or commerce in the obscene, or is it in some third category, such as non-obscene entertainment?

This puts the intent question in terms of the purpose as Chief Justice Warren develops it individually in *Roth*[47] and as it becomes the majority view in the current cases. This is whether the dominant purpose of the whole publication seems to be a serious work or pandering. The first alternative—the serious intent v. the commercial obscenity—is Warren's thought. But a third alternative has been added to the question. Honest entertainment is neither of these polar alternatives and is at the same time a thoroughly legitimate business.

> 7. If this particular work were suppressed, would an average adult American be deprived of ideas, news, or artistic or liter-

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[44] Question Four is based on Lockhart and McClure, *supra* note 2, 1960 Article, at 64. Question Five is taken from a letter to the writer by Dean Lockhart.

[45] Cairns, *supra* note 31, p. 87.

[46] *Id.* at 85.

[47] Concurring opinion of the Chief Justice in *Roth v. United States, supra* note 6a.

ary or scientific communication which you believe he ought to have?

This is the "redeeming social importance" issue which is given such vital independent standing by the Brennan opinion in the current cases. This is a matter on which the literary expert can express a view only on a small portion—the matter of literary excellence. Beyond this, neither his opinion nor the psychologist's is necessarily more valuable than anyone else's.

8. Do you believe that the widespread dissemination of this material among adults would do any harm, and if so, how?

This is intended for the psychologists. Presumably the professors of literature have a secondary contribution to make in the sense that, by comparing materials in question with materials disseminated in the past, they may have sufficient historical knowledge to evaluate probable consequences; but primarily this is not their department.

9. If you conclude that one or more of these readings is obscene, how do you distinguish it or them from the others? (For this purpose, one comparative answer will cover all readings.)

This question was intended for each group to deal with the difficulties of distinction and of definition, to see whether they felt that they could comfortably sort the work into piles of the acceptable and the non-acceptable.

EXPERT RESPONSES

A. ***Fanny Hill.***

Professor 1 thinks this work has no literary merit—just a fair degree of technical skill. Professor 2 thinks it has some literary merit. On the other hand, Professor 3 feels that "There is no question that the novel has literary merit. It is well written, well constructed, frank." Professor 4 believes that "Literary merit may be defined either as writing which is skillfully done in order to produce a certain effect (tone or meaning in the work and emotion in the reader) or as writing which offers insights into the nature of character and human life, including both human emotions and various social relationships. *Fanny Hill* possesses distinct literary merit in the first definition; markedly less in the second. Yet the main character is believable, after all, and a certain group of insights are presented."

Thus the experts divide. This does not mean that the system of soliciting expert opinion is ineffective; it means that in the particular instance we have come to a hard case, as is illustrated by the division of the Supreme Court Justices concerning this same book. Justice Douglas found merit where Justice Clark found none. On the other hand, the misfortune of the *Fanny Hill* trial is that the State left the field of experts entirely to the defense, offering nothing itself. Perhaps, had a different case been made, a different result might have been reached.

Taking Questions Two and Three together, these being essentially whether the dominant theme of the material taken as a whole appeals to the prurient interest, three of the four English professors conclude that it does. The fourth believes that the work would appeal to the prurient interests of some, but that on the other hand it would neither corrupt nor shock an average reader. Psychologists A and B believe that the work would unquestionably excite lustful thoughts. However, as one of them adds,

> Whether or not the material is shameful or morbid is another matter, since in this work there is little emphasis on the morbid aspects of sexual experience even though much of it could be described clinically as aberrant. I think it was Anatole France who said that all sexual aberrations are strange but of these the strangest is chastity. This book does go beyond the custom-

ary limits in describing sexual behavior but it is done with a style that does not ignore the more serious problems of the characters or their life situation.

The expert response to Question Four—whether the book has a purpose "to stimulate erotic response, never to describe or deal with the basic realities of life"—proves conclusively that this is a bad question. The book does both—it stimulates erotic response by dealing with some of the basic realities of life. However, when the fifth question's further element is added, as to whether the dealing with the basic realities of life is in a manner "patently offensive to current community standards," most of those answering found it clearly offensive.

As to whether the book has a serious intent or is merely a kind of pandering to the commerce in the obscene, the book is well described by one of the psychologists as "a piece of erotic entertainment." As Professor 1 puts it, "Three guesses—profit, sick mind, or delight in being a real devil. I'd lay a small bet on the last." Professor 3 thinks that it is in the third category of "amusing, amoral works intended neither to corrupt readers nor to chastise vice." Professor 4 places it in the category of "commerce in the obscene" if we are restricted to three categories, but he finds it close to the edge of becoming "obscene literary entertainment." Psychologist B thinks it "a vehicle for commercial sex rather than a serious work of literature."

Professors 1 and 2 think it would be no loss if *Fanny Hill* were suppressed. Professor 3 thinks that the suppression of this book would open the way for the suppression of others. Professor 4 makes his answer depend upon utility to whom—thus a student of eighteenth century life might find some value here—but he thinks that "little or nothing would be lost if the book were denied the 'average adult American.'"

Neither psychologist thinks that the widespread dissemination of this book among adults would do any harm. As one of them puts it, "In adults the arousal of emotion does not necessarily mean that it has to be acted upon or that if it is acted upon it must be carried out in a deviant fashion."

In summary, the overwhelming though not quite unanimous conclusion of these experts is that, applying the American Law Institute or the United States Supreme Court standards as they stood in 1963, *Fanny Hill* is pornographic—thus conflicting with the majority of the Supreme Court. If the test is offensiveness to current community standards, most of the experts think it offensive. Although they divide as to whether it has literary quality, most of them think that it has no serious literary intent. In terms of practical consequences, none of them think that its loss by itself through suppression would be a serious social loss to the community, except as it may become a precedent for suppression of other and better works. Neither of the psychologists believes that there would be any harm from its dissemination. On the other hand, one of the professors of English here makes the point quoted extensively below that the widespread circulation of the book would generally cheapen the moral standards of the community.

B. *Tropic of Cancer.*

Three of the four professors of English believe that this work has serious literary merit. None of the four think that it oversteps the bounds of the Supreme Court's definition of obscenity in terms of appeal to a prurient interest and the excitement of lustful thought. For the most part they find it a tedious book. As Professor 1 says, "I think the average person would read it only for 'indecent' passages, but I shouldn't think he'd find it very stimulating. I'd say the dominant theme was a sort of disordered egocentricity." As one of the psychologists says, "The attitude of the writer is not shameful or morbid in approaching his material. These would have to be attitudes brought to the work by the reader."

On the other hand, a different result is reached when the American Law Institute definition is utilized. Professors 1 and 2 feel that *Tropic of Cancer* does go beyond the customary limits of candor. All believe that the purpose of the work, within the limits of Miller's eccentricities, is to deal with what he thinks are the basic realities of life, although he may be doing so in a manner patently offensive to current community standards. All four acknowledge the serious intent of Miller; as Professor 1 says, "It is a nasty thing to say about the author, but I believe it is a work of serious intent. Of course, I could easily be wrong." Two of the professors think that there would be no loss if the book were suppressed, and two think that there would.

On the effects, neither psychologist believes that there would be any harm from the widespread dissemination of the book. As one of them says, "This is a clear-cut case in which the wide reading public of this book has been created artificially by the unwitting advertisement it has been given through its attempted suppression." Professor 1 says "A teacher of literature has to believe that ideas are to some extent contagious, so I can't say No. But I think the book is too dull to have much effect on most people, and that if it leads anybody astray it will be by encouraging selfish futility rather than prurient interests."

In summary, utilizing all going definitions of obscenity, *Tropic of Cancer* is generally regarded as beyond the customary limits of candor, but not as otherwise obscene. If one may attempt to diagnose the common denominator of the responses, the belief is that this is a very bad book but one of serious intent in which its erotic orientation is redeemed by the integrity of its effort.[48]

C. *Paperbound Book.*

The unanimous conclusion is that this book has no literary merit at all. Five of the six believe that the book as a whole appeals to a prurient interest and has a tendency to excite lustful thoughts, although one believes it to be such a bad book that it probably would fail in that purpose, and another thinks that its sadism probably would obscure its sexuality. Applying the American Law Institute's definition, all four of the professors of literature believe that it fully qualifies as an obscene book. One of the psychologists finds it so bad that it has not even a sexual interest. The other observes that "it is perhaps its flippant attitude towards sex, its denial of the depth of human relationships that is its most damaging aspect."

With this book we pass beyond the group of those which have any possible pretension of dealing with the realities of life—this one is pure fantasy. Hence the dominant response of the experts is that this is a book the sole purpose of which is to stimulate erotic response. Against this must be balanced the comments of those who find the book so poor that it is unlikely to evoke any response. All agree that this is the straightest kind of pandering or commerce in the obscene, and nobody thinks that the community would suffer from its suppression.

We reach then the question of whether its dissemination will do harm. Again, the psychologists think not. As Psychologist A puts it, "It seems to me that the implication in this question is always this: given a normal, healthy adult, whose life experiences have not produced serious sexual distortion, would the reading of a volume of this kind produce a morbid sexual frame of mind or a proclivity toward perversion? The answer must be No. The morbid appeal of perversion is always to the perverted and the person who does not already have tendencies in this direction will not all of a sudden be changed into a sexual monster."

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[48] Chafee, *supra* note 11, p. 265, to the contrary. He says, "If you admit that obscenity exists at all, then Miller is obscene." The record of the decisions on *Tropic of Cancer* includes the following: *Zietlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152 (1963) (not obscene); *People v. Fritch*, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963) (obscene); *State v. Huntington*, No. 24657 Super. Ct., Hartford County, Conn., 1962 (obscene); *Grove Press Inc. v. Florida*, 156 So.2d 537 (Fla.Dist.Ct.App. 1963) (obscene); *Commonwealth v. Robin*, No. 3177, C.P. Philadelphia County, Pa., 1962 (obscene); *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953) (obscene); *Yudkin v. State*, 229 Md. 223, 182 A.2d 798 (1962) (book could be found obscene; conviction reversed on other grounds); *Attorney General v. The Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N.E.2d 328 (1962) (not obscene); *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 121 N.W. 2d 545 (1963) (not obscene); *Heiman v. Morris*, No. 61 S. 19718, Super. Ct. Cook County, Ill., 1962 (not obscene); and see generally Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U.Pa.L.Rev. 834 (1964). The final word is "Not Obscene," *Grove Press, Inc. v. Gerstein*, 378 U.S. 577, 84 Sup.Ct. 1909, 12 L.Ed.2d 1035 (1964).

D. *Magazine.*

Nobody thinks the girlie magazine has any literary merit. Professors 1, 2, and 3 think that the magazine is obscene under the Supreme Court and the American Law Institute standards. Professor 4 notes a great difference between the prose and the photographs. He finds that the writing stays rather carefully within the bounds of what someone thought was legal, leaving it to the pictures to sell the publication and excite the purchaser.

All six experts conclude that the purpose of this publication is to stimulate erotic response and not to deal with the basic realities of life. As to whether it would have that effect, Psychologist B observes that this would depend upon the age and sophistication of the reader. Professor 4 distinguishes when asked to decide whether the purpose is to stimulate erotic response and when asked whether it carries out this purpose in a manner "patently offensive to current community standards." He finds them not "patently" offensive to "current" community standards.

Most of the experts think that the purpose of the work is, as one of them puts it, "pure commercial pandering," although some think it may fall at the edge of entertainment. No one supposes that there would be any social loss if its circulation were eliminated. On the other hand, neither psychologist believes that there would be any particular harm from its widespread dissemination.

In sum, the experts regard this magazine as obscene by the standard definitions; but, again, they do not suppose that someone would read it and thereupon commit a sex crime which he would not otherwise commit.[49]

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[49] It is well established that nudity without more, even if for homosexual stimulation, is not obscene; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 Sup. Ct. 1432, 8 L.Ed.2d 639 (1962); *Mounce v. United States*, 355 U.S. 180, 78 Sup.Ct. 267, 2 L.Ed.2d 187 (1957), *reversing* 247 F.2d 148 (9th Cir. 1957); *One, Inc. v. Olsen*, 355 U.S. 371, 78 Sup.Ct. 364, 2 L.Ed. 2d 352 (1958), *reversing* 241 F.2d 772 (9th Cir. 1957).

E. and F. *Mimeographed Booklet and Cartoons.*

None of the experts suppose that the two samples of hard-core pornography have any literary merit. All agree, as one of them says of one of the publications, "It appeals in the crudest way to a prurient interest." None believe that either has any bona fide or serious intent—in short, these are dirt for dirt's sake in the clearest possible way.

We then reach the consequences of the dissemination of the material. We are dealing with the grossest kind of obscenity to be found in any market anywhere. Neither psychologist thinks that the widespread dissemination of the material among adults (with an emphasis on the adults) would do any harm. Psychologist A says that, "Since adults already have their sexual orientation well crystallized and are no longer impressionable, even this material is not likely to do harm." Psychologist B believes that the materials are too crass and unimaginative to have any effect at all. Psychologist A also says,

> One distinguishing feature in the acceptability psychologically of pornographic material is the extent to which it appeals to perversion and to a destructive form of sexual functioning as opposed to a mature genitality. Much of this material makes an appeal to sexual perversion in an extremely crude and insensitive way. However, the element of perversion itself is probably not reason for suppression of printed material. Proust, which as far as I know has never been on any suppressed list, is among the most perverted of literature and yet has always been considered a work of literary merit. Similarly, "As You Like It" is filled with scenes of clear-cut homosexuality and homosexual suggestiveness, and yet no one thinks it should be suppressed. Indeed it is remarkably enough considered ideal high school freshman reading material just at an age when the students themselves are likely to be suffering from a degree of confused sexual identity. Furthermore, suppression of this kind of material seems to be attacking the problem from the wrong end. The appeal of this material is to the perverted, the neurotically frustrated, and the characterologically immature, and it is better to attack the source of the interest than its symptom.

Yet while the psychologists conclude that the dissemination of this material would not do harm, all four of the English professors think to the contrary, at least as to persons already disordered. As Professor 3 puts it, "I believe that a booklet as filthy and depraved as this could arouse the worst instincts in readers lacking moral stability."

G. *Comparison and Comment.*

The difficult question becomes, how do these experts sort these matters out and tell them apart? The one expert who thought that both *Fanny Hill* and *Tropic of Cancer* were not pornographic makes his distinctions this way:

> The cartoons and the mimeographed booklet are pornography at its crudest. They have no literary or artistic merits and pander to the lowest desires and instincts. The paper bound book and the magazine are cheap, trashy, even nasty. They are only a step away from pornography if they are even that. *Fanny Hill* and *Tropic of Cancer* cannot reasonably be considered pornographic. Both have genuine literary merits and valid artistic purposes.

Another of the professors of English summarizes thus:

> I'd say that the last four [paperbound book, magazine, mimeographed booklet, and cartoons] are unquestionably obscene, three obviously for profit, and the mimeographed book possibly for that, more probably a sick fantasy. *Fanny Hill* shows much more technical skill and intelligence, but otherwise belongs in the same class. If anything should be censored, all these should. Miller's book does not seem to me pornographic in intent. I'd call it the honest expression of a worthless mind. I can't see how it would do anybody any good, but if we censored this I don't know where we'd stop.

The distinguishing line for the other two of the professors of English is the intent of the author. As one of them puts it,

> Regardless of the difficulties in establishing an *author's* intent, it seems to me possible to make judgments about the apparent intent of the work as it exists before us. And it is on the basis of this apparent intent that I distinguish obscene writing from other kinds. If a work apparently exists for no other reason than to appeal to a prurient interest as defined in Question No. 2, it seems to me obscene. If, however, certain disputed passages or even words contribute—in the total context—to the intelligent development of character or to the presentation of "life," which I take to include the nature of man and the nature of man's various relationships with his society, then obscenity ceases to be the issue, perhaps even ceases to exist. It is on this basis that I exempt *Tropic of Cancer*, crude and even disgusting as it may be; place *Fanny Hill* on the border-

> line; and place all the other exhibits in the category of the obscene, regardless of the degree to which they are in fact explicit or the degree to which they technically exceed "customary limits of candor."

Panels of experts from two universities predominantly conclude that five out of six of the sampled materials are obscene. Of those five samples, two are gross extremes of pornography, not in common exchange; they are what is described by Lockhart and McClure as "so foul and revolting that few people can contemplate the absence of laws against it."[50] The other three are either typically or specifically available to anyone who wants to buy them in most if not all American cities of any size. Any adult—any young adult—and probably any child mature enough to wish to make the purchase can probably get his hands on most of them. If these samples are, as the experts predominantly conclude, technically obscene, then this country is being flooded with obscene literature without any real working controls.[51] On the other hand, under the Supreme Court standard, two of them (*Fanny Hill* and the magazine) are not obscene.

I must note that I do not personally take quite so gloomy a view as the panels here assembled. I have no serious personal doubt but that the *Fanny Hill* is a pornographic work. It is said by John Ciardi in the *Saturday Review* to be as plainly a pornographic work as he has ever seen.[52] Granting that the judgments are subjective, I do not myself see much difference but the binding between it and the plainest hard-core pornography in the collection. With all due respect to the Justices of the Supreme Court taking a different view, the difference between so-called comic book hard-core pornography and *Fanny Hill* is solely that one verbalizes what the other pictures. The difference between having the experiences explained in running prose, line after line, book style, or in a balloon over a comic figure's head, seems to me not much. If Putnam can publish this, then there is very little meaningful limitation on the dissemination of obscenities in the United States. The third and fourth samples, however—the paperbound book and the girlie magazine—I find on a troublesome margin. They occupy the point of the systematically and determinedly salacious; whether they are over the line into obscenity, I am not personally comfortably sure. Certainly they serve no useful purpose, and certainly they are typical of a vast amount of current publication.

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[50] 1960 Article, *supra* note 2, p. 26.

[51] For documentation, see Kilpatrick, *supra* note 13.

[52] Review, *Saturday Review*, July 13, 1963, p. 20. [Footnote continued on p.32.]

Mr. Ciardi says with great accuracy,

> With all scholarly details in place, however, and with all incidental stylistic merits recognized, the book still remains an overt piece of pornography. It was conceived and written with no intent but to titillate the reader by ringing the sexual changes in minute (and yet evasive) detail, the author's catalogue of sexual variations being limited only (and considerably) by his own lack of imagination. (He might at least have read the classics and given Roman substance to English mannerism.) With Cleland's series of sexual encounters there is no effort to depict the lives of men and women seriously. The details of sexuality are, in fact, suggestively exaggerated. The seeming naivete of Fanny's memoirs is not the result of simplicity but is an artful coloration of the tone, clearly designed to heighten the suggestiveness of the sexual narration. And the author himself could not have begun to believe that life in a London brothel was remotely as he described it.

On the other hand, J. Donald Adams, *Speaking of Books, N. Y. Times* Book Review Section, July 28, 1963, p. 2, seems rather inconclusively to think otherwise.

THE RELEVANCE OF MERIT AND INTENT: THE RELATIONSHIP OF EXPERTS

The primary function of a literary expert in an obscenity case relates to the evaluation of the literary merit of the work and to the determination of the intent of its author. While there is no doubt that in a disputed case a literary expert is a helpful guide as to each, there is very great doubt as to the relevance of either.[53]

(a) There is no reason why a work cannot be both meritorious and obscene. Great writers have on occasion tried a hand at the erotic, and their skills are much the same as when they are at tamer stuff. The older writers, in an era before obscenity was recognized as a social offense, made no distinction at all, so that there is no difference whatsoever in the literary merit of Chaucer obscene and Chaucer sedate or Boccaccio bawdy or merely entertaining.

Indeed literary skill may heighten the very factors which make for obscenity. If the elements to be measured are appeal or incitement, the talented hand will do considerably better with it than a clod. For illustration, half our experts think that *Fanny Hill* has some literary merit, though only one gives it much, but almost all of them think that it is an obscene book.

I suggest therefore that literary merit ought to be important for some purposes in obscenity cases, and that expert testimony concerning it may be significant, but not for the purpose of determining whether the work is obscene. For this purpose it is simply irrelevant.[54]

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[53] Under the strict "hard core" approach, experts may be superfluous because no expert may be needed on the obvious. It does not take an expert to tell that a dirty cartoon book is a dirty cartoon book; no one would be in much doubt about it. In these cases, which involve a very large fraction of the challenged literature, it would be a waste of time to involve experts.

[54] For emphatic acceptance of this view and rejection of the opposite view of Judge Learned Hand, see the opinion of Judge Goodman in *United States v. Two Obscene Books*, 99 F.Supp. 760 (N.D.Cal., 1950). If I am correct, Judge Goodman is right and the opinion of experts is irrelevant to the issue of obscenity as a matter of literary merit; but it is very relevant to the affirmative defense.

This is the view of the Japanese Supreme Court on their translation of *Lady Chatterley*.[55] The Japanese court fully recognized the artistic quality of *Lady Chatterley*, finding it not only in the book as a whole but also in the various descriptions of sexual activities. However, the court said:

> Art and obscenity are concepts which belong to two separate, distinct dimensions; and it cannot be said that they cannot exist side by side. . . . [T]he obscene nature of the work cannot be denied solely for the reason that the work in question is artistic literature. . . . No matter how supreme the quality of art may be, it does not necessarily wipe out the stigma of obscenity. Art, even art, does not have the special privilege of presenting obscene matters to the public. Be he an artist or a literary man, he may not violate the duty imposed upon the general public, the duty of respecting the feeling of shame and humility and the law predicated upon morality.

(b) Almost the same can be said of intent. Most of the experts, most of the thinkers on the subject, regard intent as of crucial importance—the integrity of the work is thought to determine whether it is obscene. By its position on the relevance of pandering, a majority of the Supreme Court has in the current cases made this a vital element in determining whether a given work is obscene or not—in the *Ginzburg* and *Mishkin* cases, the obvious intent of the purveyors of *Eros* and the miscellaneous pamphlets to be as salacious as they can be is argued to control the definition of their conduct almost regardless of the nature of the material they were purveying.

As noted earlier, I applaud the pandering test as a genuinely useful, new contribution in this field without at the same time thinking that it disposes of all intent problems. Its major, underlying contribution is its recognition of the concept of variable obscenity—i.e., of the conception basically developed by Lockhart and McClure that something may be obscene for one purpose and not for another.[56] The identical materials need not be classified for legal purposes in the same way when imported by the Kinsey researchers as when sold in a drug store.[57]

The intent branch of the topic, now covered by the Court so far as pandering is concerned, needs tighter thinking than it has yet had in other respects.[58] The Who and When of intent each confuse the simplicity of the artistic integrity approach. Is the social judgment concerning the dissemination in the 1960's of *Fanny Hill* and *Tropic of Cancer* to be measured in terms of the intent respectively of an author who died two centuries ago or of the expatriate who spent years of his life creating his book for no apparent reward? The recent cases, by adopting the pandering approach, indicate that it is to be evaluated in terms of the intent of the publishing house which in the case of the dead author makes all of the money and which in the case of *Tropic of Cancer* makes most of it. But what of the intent of the book seller who manages to classify the works on his shelves so that these two books stand next to each other, having in common absolutely nothing except an identity of appeal to most of his customers?[59]

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[55] *Kayama v. State*, 11 J.Sup.Ct.Crim. 997 (1957), as reported in Tokikoni, *Obscenity and the Japanese Constitution*, 51 Ky.L.Jour. 703 (1963), which I have used as my source on this case.

[56] See those authors cited *supra* note 2, 45 Min.L.Rev. 5, 68; and see Gerber, *A Suggested Solution*, [etc.] 112 U.Pa.L.Rev. 834, 849 (1964).

[57] *United States v. 31 Photographs*, 156 F.Supp. 350 (S.D.N.Y. 1957).

If the question is the intent of the author, this too may be a variable thing. The work by the Kronhausens on the theory of obscenity is in many respects the most useful and instructive lengthy work in the field.[60] Its distinction between erotic realism on the one hand and pornography on the other may well be legally useful and is in any case well developed —with a wealth of illustration. When the authors set out to write their books they may well have had the highest integrity of intent. One will perhaps be pardoned for doubting whether, when they concluded to permit their book to be put into a paper edition and sold in the drugstore trade, that intent was still dominant. Clearly at this point they are reaping a harvest based more on their illustrations than on their theories.[61] If carried sufficiently to the point of pandering, this may be impermissible.

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[58] Except perhaps by Professor Kalven, who anticipates my thoughts on this subject in Book Review, 24 U.Chi.L.Rev. 769, 774-75 (1957), wording what I am here calling an "affirmative defense" as a "privilege." He in turn draws on the thoroughly original opinion of Judge Jerome Frank, concurring in *Roth v. United States*, 237 F.2d 796, 801-27 (2d Cir. 1956). On the other hand, Professor Kalven treats merit as an element of the definition of obscenity in his *Metaphysics of the Law of Obscenity*, 1960 Sup.Ct.Rev. 1, 13.

[59] The intent of the book seller is made a required element of proof in *Smith v. California*, 361, U.S. 147, 80 Sup.Ct. 215, 4 L.Ed.2d 205 (1959), discussed from this standpoint in Lockhart and McClure, *supra* note 2, 1960 Article, 103-08.

[60] Kronhausen, Eberhard and Phyllis, *The Psychology of Erotic Realism and Pornography* (New York, 1959).

[61] For illustration of a book I look forward to *not* reading, see Seaver, *Writing in Revolt* (1963), currently offered by the Mid-Century Book Society and which from its advertising appears to be a systematic collection of what the publisher describes as "uniquely dirty." 57 Mid-Century Review 4, 29 (1963).

The intent talk overlooks the really necessary legal distinctions between general and specific intent. There are undoubted obscenities which are published with the highest of motives by cranks, fools, and perverts. A leading case on obscenity concerns a work written by a dedicated Protestant as an attack on the Catholic Church.[62] Objectively considered, the resultant product is indisputably obscene, and yet the intent is nothing short of holy. There are numerous such "nut" works. Clearly, if specific intent is required, these works are not obscene; and yet, by any objective standard, they are.

The answer, I think, is that, apart from pandering, intent by itself is not significant.[63] The importance of intent is as a subdivision or ingredient of the judgment on artistic merit. Good intentions do not make a book or a painting a work of art, but the intent is an important element in determining the worth of the resultant product.

(c) The thought just developed is that literary merit has nothing to do with whether a work is obscene or not, and that intent is simply a subdivision or element of the judgment on literary merit. It follows that intent also has nothing to do with whether a work is obscene.

But this does not mean that merit and intent are not relevant to the ultimate judgment to be made. Far from it—they may be controlling. The ultimate question is not whether the particular work is obscene, but whether it shall be suppressed, not whether a particular book seller has sold an obscene book, but whether he should be punished. There are really two judgments to be made. The first is whether the work is obscene as defined by the authorities; i.e., does it have the forbidden appeals, shock the common sense of candor, and so on. The second judgment is whether, even assuming that these questions are answered in the affirmative, the merit of the work is so great that its negative qualities should be overlooked. The literary merit, and with it the intent, are what is in law regarded as an affirmative defense. What we are really saying about Chaucer or about Boccaccio is that here may be an obscene book but it is a very, very good one, so good that its quality is more important than its deficiencies. We are saying that society would lose more by the loss of this work if it were suppressed than by the injury to its tabu standards if it is allowed to circulate.[64]

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[62] *Regina v. Hicklin, supra* note 21. The argument in this case quotes Lord Eldon as believing that *Paradise Lost* would be legally offensive if its object were not "to promote the reverence of our Religion." Murphy, *The Value of Pornography,* 10 Wayne L.Rev. 655, 656 (1964), gives an illustration of a most sincere and most happily libidinous passage in which St. Jerome appeals to the nuns to enjoy their marriage to Christ.

[63] As Judge Woolsey puts it in determining whether a book is obscene, the decision must be "irrespective of the intent with which it was written," *United States v. One Book Called "Ulysses,"* 5 F.Supp. 182, 184 (S.D.N.Y. 1933); Lockhart and McClure, *supra* note 2, 1954 Article, regard intent as not conclusive, 348-50.

In current terms, this is particularly true in relation to *Tropic of Cancer*. This is a book which is obscene by any knowable standard, but the plain integrity of the work redeems it. It may be—it is for me—a book too dull to read, but it so clearly is an honest craftsman's try that each expert consulted here who has considered it would regard it as a social loss to suppress it.[65] On the other hand, *Fanny Hill* does not have clear enough merit to rescue it from a contrary judgment.

In advancing this view, I am consciously following the views of Justices Clark and White in the recent cases and not those of Justices Brennan and Fortas and the Chief Justice. The precise distinction between them is here: the Brennan test of obscenity has three elements, each standing absolutely independent of the other: first, the dominant element of prurience; second, offensiveness; and third, the total absence of redeeming quality including literary quality. Justices Clark and White think that the literary quality is a factor in determining whether the dominant element is prurience. By this merger of conception, the one can be balanced against the other. This approach accords the view of a later Japanese decision than that quoted above holding that a work's "literary quality or philosophical quality" may mitigate the determination of what would otherwise be objectionable.[66]

The practical difference between the Brennan approach and the Clark-White approach is illustrated in *Fanny Hill*. The book is as totally dedicated to the appeal to prurience as anything can be—it has lived for this purpose alone for two hundred years. Certainly no one would choose it very seriously for the sake of the story or for the skill of its expression or as a serious description of eighteenth century London; as has been noted, Justice Clark makes absolute hash out of its literary pretensions. Yet it is not totally without literary skill in the sense that a dirty postcard might be; it is at least passable writing. If no more is required, then under the Brennan test the book clears; but, if the exceedingly low level of literary accomplishment is balanced against other factors, then the book fails.

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[64] The approach I am taking here is in accord with the English Obscene Publications Act of 1959, which makes merit a defense. My position in this regard is the flat opposite of the American Law Institute's Reporter, Comment, *supra* note 2, pp. 34-35, who rejects this whole approach as unconstitutional; but in this one instance I do not believe that the eminent Reporter's materials come even close to supporting his position. The review I suggest seems to be supported by Judge Learned Hand in *United States v. Levine*, 83 F.2d 156, 158 (2d Cir. 1936)—"salacity" of the work must "outweigh any literary, scientific or other merits it may have in what reader's hands; of this the jury is the arbiter." This is precisely the aproach taken by the Treasury Department in exercising discretion under Sec. 305 of the Tariff Act of 1930 to admit publications for recognized merit.

[65] This is the essential theory of the decision upholding the book as nonobscene, *Attorney General v. Book Named "Tropic of Cancer," supra* note 48.

[66] Tokikoni, *supra* note 55, 51 Ky.L.Jour. at 707.

On the first judgment—whether the book is or is not obscene under the accepted standards—the literary expert is of some value. Insofar as a notion of common standards of candor is involved, he presumably knows them as well as any other expert. It is on the affirmative defense of merit, however, that his value peaks. He is able to see the relationship of the challenged work to the general stream of literature and to help guide the factfinder as to whether the merit of the work is great enough to be worth putting up with it.

THE UNANSWERED QUESTIONS AND THE EXPERTS

The foregoing discussion is all premised on the assumption that there both can and should be some control of the dissemination of obscene materials in the community, or at least that governments may constitutionally so conclude. Treating the matter historically, I cannot find any real relevance between the First Amendment and this problem. I cannot believe that Jefferson and Madison intended to guarantee a merchant the right to make money by showing for a price the movements of a woman's face in orgasm.[66a] Indeed, as it seems to me, it cheapens the greatest contribution to free government of the Anglo-American people to reduce it to a license to hold a peep show.[66b]

But the problem transcends historicity, which is properly only the start of inquiry. The contemporary question is, what should we do now? The real problem for the Supreme Court is to lay down sound policy in a difficult area.

It is in this respect that the Court is, I think, doing only part of its job; and it is in this respect that there is a function for experts.

A. *Social Consequences.*

In the current cases, only Justices Douglas and Clark are really facing and considering what sound policy should be. Justice Douglas asks why sex deviates, including masochists, should not be allowed to communicate with each other in symbols important to them. He asks by what right we can determine that the deviates' social value is not as important as the majority's social value. "Redeeming" to whom? "Important" to whom? Moreover, he asks, if people wish to enjoy ribald humor or locker room jokes, why shouldn't they? They are permitted to do so without legal restraint in the locker room. Why should they not be permitted to print what they can say?

[66a] *Jacobellis v. Ohio, supra* note 5, noted, on nature of activity, at 39 N.Y.U.L.Rev. 1063, 1078 (1964). Cf. Milton, *Areopagitica*, citing to 3 *Harvard Classics* 189, 195, 206, 208-09 (1937).

[66b] There is some allusion to problems of obscenity in Milton, *Areopagitica*, *supra* note 66a, at 195. Milton notes that Ovid had been banished from Rome in his old age "for the wanton poems of his youth," but he describes this as really a political object and not as a significant precedent since "the books were neither banished nor called in." There are also obscure references to what may have been supposed to have been indecencies, pp. 206-07, and passing references to society's incapacity to "banish all objects of lust," p. 208; but this appears to allude to matters of thievery. Other references to books of a "sensuous" or "vulgar" or "chaster" nature seem to be seventeenth century word usages which have no relationship to this subject matter.

These are serious philosophical and social questions. They deserve some answer. They deserve some deeper consideration of the problem of social tabus and offensiveness and privacy than the Court has given. Again we advert to the Japanese view of the same matter: "Be he an artist or a literary man, he may not violate the duty imposed upon the general public, the duty of respecting the feeling of shame and humility and the law predicated upon morality."[67] Should there in truth be such a duty?

1. *Incitement to Crime.* A majority of the Court—seven of the Justices in recent cases—are not facing the issue of possible social harm from the dissemination of obscene material, and yet this is surely a vital element in the course of decision. Only Justices Douglas and Clark talk squarely of this problem.[68] Justice Douglas cites the general absence of solid proof that literature causes sex crimes, and he cites clear illustrations to show that many a sex criminal may be stimulated by completely wholesome material.[69] This includes illustration of, for example, a sex maniac inspired to commit his crimes by the movie *The Ten Commandments*.

On the other hand, Justice Clark cites substantial authority tending to show a direct connection between the literature of perversion and crimes of perversion.

Literature on this point is inconclusive.[70] Probably the best study of the effect on conduct of prurience of nudes, observing genitalia, observing sex acts, lewd artistic stress, and so on comes to conclusions which the authors themselves define as "modest."[71] On the other hand, one of these authors thinks that there is a social risk at least where "obscenity falls frequently and easily into the hands of the immature." Mr. Murphy, the leading authority for Justice Douglas, acknowledges that vicarious use of sexuality may be dangerous—"the means of misuse of sexuality by various means remains."[72] J. Edgar Hoover expressly connects "the pornography racket" causally with criminal behavior.[72a]

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[67] Tokikoni, *supra* note 55, 51 Ky.L.Jour. at 706.

[68] *Ginzburg v. United States*, *supra* note 1, 86 Sup.Ct. at 974 (Douglas), *A Book, etc. v. Attorney General of Mass.*, *supra* note 1, 86 Sup.Ct. at 993-95 (Clark).

[69] Justice Douglas makes heavy use of the outstanding article, Murphy, *The Value of Pornography*, *supra* note 62.

[70] We are long on opinion but short on facts on this vital point. Francis J. Connell, C.SS.R., in *Censorship and the Prohibition of Books in Catholic Church Law*, 54 Colum.L.Rev. 698, 706-08 (1954), sets himself to rebut Mr. Verner W. Clapp, Acting Librarian of Congress. Mr. Clapp says,

> The notion that mankind is corrupted by books is, I believe, a notion held by those whose own reading has been largely of that enforced and unselective kind which the mass media provide. Books are corruptive only to those who seek to be corrupted; but they are already corrupt.

Father Connell replies,

> Despite the dogmatic assurance with which this statement is made, the fact is that people can be influenced to evil as well as to good by what they read.

For myself I have no comfortable opinion on this point. Whether, for example, the pervert literature feeds the pervert act or whether both appetites come from the same source is simply not clear. I am hesitant to conclude that a state may not see fit to make up its mind on this subject on the basis of what information it has.[73]

Certain subsidiary problems warrant closer study and analysis:

(a) Until the *Mishkin* decision, it had sometimes been supposed that pornographic material needs to be divided between the merely offensive and the potentially inciteful. The lowest forms of pornography are probably for most persons more revolting than action-inducing. The Brennan opinion in *Mishkin* should put an end to the dispute as to whether certain pornography escapes being excessively appealing by being revolting. With reference to those publications which appeal only to deviates and which offend the average person, Justice Brennan says that this is immaterial for purposes of the law of obscenity:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather then the public at large, the prurient-appeal requirement of the *Roth* test

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[71] Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn.L.Rev. 1009 (1962).

[72] Murphy, *supra* note 62, 10 Wayne L.Rev. at 670.

[72a] Hoover, *Combating Merchants of Filth*, 25 U.Pitt.L.Rev. 469 (1964).

[73] A leading bad effect view is Wertham, *Seduction of the Innocent* (Rinehart Co., Inc., 1953), dealing particularly with sadism in comic books. Numerous illustrations are offered purporting to show clinically a causal relation between the readings and the conduct. The trouble is the problem of causality—a girl is promiscuous and reads twenty comic books a day, pp. 186-87. But which is the originating or causative taste, if either? For all these doubts, Wertham describes vast quantities of material which certainly cannot do anyone any good. See also for excellent factual references *Censorship & Obscenity; A Panel Discussion*, 66 Dickinson L.Rev. 421 (1962); and see *Report of the Select Committee on Current Pornographic Materials*, H.R. 2510, 82d Cong., 2d Sess. (1952), known as the Gaithings Report, p. 107, for testimony asserting a factual connection between obscene literature; summarized in *Comment*, *supra* note 2, pp. 14-20, and discussed in Gelhorn, *Individual Freedom*, *supra*, note 2, at pp. 60-67.

> is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.[74]

This permits closer thought on the stimulus effect of pornographic publications on perversions and on normal sexual activity considered separately. The psychologists generally concur that perverts make books but that books do not make perverts. Doubtless the pervert would not usually be dwelling on such literature if he were not disturbed to start with. But whether and to what extent such literature *increases* the activities of persons already inclined to perversions enters areas of abnormal psychology into which I am not prepared to go, but in which I do not believe the psychologists have comfortable answers.

(b) The effects of pornographic materials on children are usually conceded to be undesirable. Some distinction needs to be made in ages; the effects on a pre-puberty child may be quite different from those on an adolescent.[75] Nonetheless, even the best friends of complete license in the field of publication are inclined to distinguish the case of children and to feel that the materials may have ill consequences for them.

But this whole approach assumes a rigidity or pigeonhole structure to the distribution of publications which is actually nonexistent. These are not three islands populated respectively by normal adults, by emotionally disturbed adults, and by children, all separated by impassable oceans. Rather, all are jumbled together in the sea of population. The only practical question is whether a given publication is to be tossed into that sea.

At this point, my thinking fumbles. Clearly publication distribution cannot be controlled by the standards of children and the disturbed; but it may profitably be guided by consideration of them.[76] Our society is not so organized that written material commonly available to adults can as a practical matter be kept from children. We are not dealing with something like alcoholic beverages consumed on the premises for which an I.D. card can be required. The law is essentially incapable of doing more than making a stab at controlling the first sale of written material.

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[74] *Miskin v. State of New York*, 86 Sup.Ct. at 963, *supra* note 1.

[75] For distinctions in responses showing a higher fantasy capacity and responses in fifteen- to eighteen-year-old children than those aged twelve to fifteen, see Cairns, Paul & Wishner, *Sex Censorship;* [etc], *supra* note 71.

[76] "We cannot limit the adult population to reading only what is fit for children or pervertedly susceptible adults." *Comment, supra* note 2, p. 7; for classical references to the children problem, see the opinion of Justice Douglas in *Times Film Corp. v. Chicago, supra* note 25.

Controls based upon the age of the original purchaser will probably be ineffective if we mean seriously to keep particular written material out of the hands of children.

2. *The Problem of Promiscuity.* A problem which really matters is the problem of promiscuity in American life and with it the problem of the overwhelming sex orientation of the American community. I mean here not to speak about the problems of morality in the abstract, but rather very precisely of social behavior. One of the major misfortunes of contemporary America is the enormous number of grossly premature marriages based wholly on sexual attraction, resulting in prodigious numbers of divorces and the absence of family upbringing for children. With this is coupled the volume of illegitimacy.[76a] I leave it to the sociologists to describe the big picture. As a practicing lawyer, what I see as a by-product from my small vantage point is dark and ugly tragedy. The real social vice in obscenity is quite possibly not that it inspires to crime, but that it descends to callousness. As one of the experts quoted earlier says of one of the works, "It is perhaps its flippant attitude towards sex, its denial of the depth of human relationships that is its most damaging aspect." As another said of *Fanny Hill,*

> I believe that [the widespread dissemination of this book] would contribute powerfully to the breakdown in conventional moral standards which has been underway for years. This breakdown may well be inevitable, but the novel certainly contributes to it by suggesting very skillfully that promiscuity is extremely pleasant, relatively free of real dangers, and potentially rewarding in money, social position, and even character development. Not least of the danger lies in the sophistication which the author himself displays. His perfect aplomb suggests that there is nothing to fear from the forces of conventional morality.[77]

This is essentially the same as the view of Justice Harlan:

> The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials,

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[76a] A current responsible estimate is that one of every six girls reaching the age of thirteen in Connecticut this year will be pregnant out of wedlock before the age of twenty; and the national rate is thought to be equally high. Brecker, *1 out of 6, New York Times Magazine,* May 29, 1966, p. 6.

[77] Lockhart and McClure, *supra* note 2, 1954 Article, describe and discuss this approach as "ideological obscenity," pp. 333-35, and think recent Supreme Court decisions have discarded it; 1960 Article, *supra* note 2, 39-42.

> the essential character of which is to degrade sex, will have an eroding effect on moral standards.[78]

I have no doubt at all that these works have this effect. For purposes of reaching this conclusion, expert opinion is scarcely necessary. While the experts are making up their minds, it would be little short of preposterous to believe that education is largely based on what is read, and yet that this particular writing has no consequences. As Professor 1, quoted above, says, "A teacher of literature has to believe that ideas are to some extent contagious." If there is educational consequence when the teacher takes the kiddies to the firehouse, I must assume that there is also some educational consequence if, directly or by the written word, the teacher takes the youngsters to some other kind of house.[78a]

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[78] *Roth v. United States, supra* note 6a. The Supreme Court appears to reject the view that promotion of promiscuity may be curbed; see *Kingsley Int'l Picture Corp. v. Regents*, 360 U.S. 684, 686, 79 Sup.Ct. 1362, 3 L.Ed.2d 1512 (1959). The New York Court had upheld the restriction of the *Lady Chatterley* film because it portrayed "acts of sexual immorality . . . as desirable, acceptable, or proper patterns of behavior." The Supreme Court held that a state cannot prohibit a film because it advocates adultery.

[78a] The world of mass entertainment, like other worlds, has both a habitual life and cruces or high points; and although for a time the popculturist was uncertain how to distinguish the one from the other—how, that is, to separate mere occurrences (a season of Ben Casey, a mound of *McCall's*) from significant developments—criteria are beginning to emerge. The surest of these criteria appears to be that which defines a major popcultural event as *success in a declining medium*, or vice versa. And the girlie books plainly qualify as events when judged by this standard. The past decade, as is well known was catastrophic for mass magazines. Between 1950 and 1960 thirty-two of the country's two hundred and fifty largest publications quit the game—or merged. And as Woodrow Wirsig, editor of *Printer's Ink*, points out in *Harper's*, "of the magazines reporting their profit and loss statements in 1960, 39 percent showed losses." Aware of these statistics, no one can shuffle away the success of the girlie books into an easy generalization about rising literacy rates or normal patterns of production and consumption. Vulgar or dull, shy or brash, U or non-U, these magazines stand as counterthrusts to current reading trends, manifestations of a free impulse of public taste. And it is for this reason that their claim to regard, as puzzles worth more than a moment's effort to solve, cannot be dismissed out of hand.

As might be guessed, the key to the puzzle lies in the nature of the magazines' simplification of experience. The *Playboy* world is first and last an achievement in abstraction: history, politics, art, ordinary social relations, religion, families, nature, vanity, love, a thousand other items that presumably complicate both the inward and outward lives of human beings—all have been emptied from it. In place of the citizen with a vote to cast or a job to do or a book to study or a god to worship, the editors offer a vision of the whole man reduced to his private parts. Out of the center of this being spring the only substantial realities—sexual need and sexual deprivation.

—De Mott, *You Don't Say*, 7-8 (Harcourt, Brace & World, Inc. 1966).

But this only opens a difficult question; it does not answer it. The real problem to which the Supreme Court has not addressed itself and which does give room for expert study is whether the contribution of obscenity to the general consequences of promiscuity in the society is large enough to make any significant difference. One might very reasonably conclude—I am so inclined, until the experts can persuade me otherwise—that the total social wave of sexuality is so large that the obscene portion probably makes very little difference. In an age in which automobiles are sold by the phallic symbols on the radiators or in which the general stripe of books available amounts to a paean in praise of fornication, Henry Miller may be immaterial, whether he is obscene or not. The last two immature mothers with illegitimate children with whom I have had some professional contact have deeply unhappy lives, but obscenity certainly had nothing direct to do with it.

Somewhere in our society we ought to be entitled to have someone face directly the question of whether obscenity seriously contributes to the degeneration of the actual lives of persons who are not inspired to actual crime at all. It may be that sociologists can make a contribution here.

But whether the experts could help or not, the courts ought to face this question. Social standards do not need to be flushed down the drain simply because the social scientists have not yet found methods of assessing the causal relationships of publication and behavior. This relation may be, as felicitously observed, a matter of "expert conjecture"[79] with no demonstrated method of proving connections between the erotic deluge and the observed evils of promiscuity, premature sex relations and marriages, and mounting divorce levels.

3. *The Legitimate Claims of Eroticism and the Hazards of Suppression.* Eroticism is defined in a standard dictionary as "the arousal of or the attempt to arouse sexual feeling by means of suggestion, symbolism, or allusion in an art form."[80] So defined, it is clearly a legitimate part of human experience, fairly, properly, and inevitably a subject of any art. Even straight pornography has its exponents in the name of intellectual freedom.[81]

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[79] Cairns, Paul & Wishner, *supra* note 71, 1015, 1035-37, discussing valuably also the methodological problems of this research.

[80] *Webster's 3d New Int'l Dictionary* (G. & C. Merriam Co. 1961).

[81] See Girodias in the Steiner-Girodias debate, *Encounter Magazine*, October 1965, February & March 1966.

Mr. Cairns, on the matter of social value, has said,

> Although many writers have undertaken to show that pornography in itself is harmless and therefore ought not to be the object of governmental suppression, no positive case has been made out for it. The elimination of the crude and pathetic photographs and booklets which now constitute the bulk of the trade would be no loss to the world whatsoever.[82]

This is not true if a stream of even this much censorship will burst its banks and reach higher ground. The real fear is that by permitting the least amount of control, we will get Comstock back again and cut into legitimate artistic portrayal of human experience or aspirations.

We need thought on probabilities, on the probability of antisocial conduct as a result of obscenities, or of deteriorating moral values, or of injury to children, or of community outrage; and we need this in relation to the likelihood of artistic injury. We may legitimately ask the Supreme Court to consider these matters; and experts may have something of value to say about them.

B. *The Future of Experts.*

If the Court holds to the standards of the recent decisions, experts will be makeweight rather than truly significant in future obscenity cases. As has been noted, hard-core pornography needs no experts. Passing this level, if the standard is "patent offensiveness," and if *Tropic of Cancer* or *Fanny Hill* do not qualify, experts will be hard put to find anything which will.

Under the majority approach, the more likely area for expert testimony is as to whether the work has any redeeming social value, including any literary value, no matter how little. As the *Fanny Hill* opinion shows, on the standard of literary values, the Court is accepting almost any kind of superficial literary palaver as expert testimony. The cases prove that one can find a professor of English somewhere to testify in support of anything, and, by the lenient Court standard, this is apparently good enough.[83] If *Fanny Hill* has literary merit sufficient to give it "redeeming social value," then substantially anything, so long as it is neatly printed and discreetly sold, passes the test. The only area left open for dispute goes to the quality and purpose of the merchandising, and on this there are no experts.

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[82] Cairns, Huntington, *Freedom of Expression in Literature*, 200 Annals of Am. Acad. Pol. & Soc. Sci. 87 (1938).

[83] On the other hand, Justice Douglas at least is insisting on a very high standard of expert proof as to whether pornography does social harm.

If, on the other hand, the approach suggested in this article and taken from the opinions of Justices Clark and White were adopted, literary merit would become an affirmative defense for a work otherwise obscene. In this approach, literary experts would have a genuine and important contribution to make. In this approach, too, sociologists might have something important to say on the problems of social value and their relation to publications.

The largest function of the experts is for a wholly different duty than has yet been suggested. We have been talking of experts in court proceedings; but clearly the overwhelming bulk of these matters will never reach court level. They scarcely could, or both the prosecutors and the courts would have nothing else to do. Most of these decisions must be made informally, at a level of police law enforcement short of prosecutions. It is impossible, unreasonable, and altogether undesirable to expect police officers to make decisions about bulky printed material.

We come back, as usual, to Mr. Cairns and his example. Each large community has its available experts. They can serve as boards to guide police action and to develop local standards of decision.[84] These are decisions to be made, not by citizens' committees ignorant of literary standards and values, but by persons with legitimate claims to knowledge. The panels in Phoenix and in Champaign-Urbana could perfectly well be advisory boards giving occasional time to police guidance.

It is easy to expect too much of experts. A Superman is not going to flash down from the clouds to solve this any more than any other community problem. On past occasions, the experts have reflected every prejudice of their communities, and doubtless they will again. But if the determination of obscenity is to be attempted on any rational, as distinguished from a merely instinctive, basis, the experts can help the community to solve this problem as well as it is likely to be solved.

And it warrants solution.

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[84] The City of Chicago's Motion Picture Appeal Board has been established on this theory; see Mulroy, *Obscenity, Pornography & Censorship*, 49 A.B.A.J. 369 (1963).

Obscenity and the Teacher: Another View

Robert F. Hogan

Mr. Frank's paper and his comments on it do much to clarify the implications of the recent Supreme Court decision in the Ginzberg case and earlier decisions such as that in the Roth case. Yet I find myself in a peculiar position. I am as distressed as Mr. Frank by the increasing accessibility of obscene materials, as well as by a structure of law that teeters too often on five-to-four decisions. This paper will ultimately affirm support for a structure of experts like that proposed by Mr. Frank. However, the support will rest on wholly different reasons, and it will envision a greatly different function.

The censor operates from any of three bases. The test of their validity must be whether they are both clear and operational. Some would censor a book because, first, it outrages public decency by violating one or more tabus, or second, the reading of it will lead to overt harm—promiscuity or sex crimes, including perversion. These two bases, treated in Mr. Frank's paper, are *un*clear but operational, and therefore doubly dangerous, as will be discussed below. A third base, rarely mentioned in open discussion, is much clearer than these two. It finds concise and forceful expression in Matthew IV:28—"Whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart." The private thought itself is the sin—irrespective of overt action or any affront to public decency. And anything that might arouse the thought should be banned. That is clear enough. The difficulty is that this basis for censorship is wholly unoperational.

The scope of the problem makes this basis unworkable. The occasion of this violation of the moral code lies not solely in books like *Fanny Hill* and in "girlie" magazines. As Mr. Frank notes, it pervades a major part of the advertising industry. But when we have banned the books and enforced a code of modesty in the advertising industry, we have only begun. We also have to clean up the movies, cover the pictures, drape the statues, loosen the ski pants, redesign the bathing suits, lengthen the skirts, and enlarge the sweaters. And having done all that, we are still left with the urge in a world half filled by living, breathing creatures who either are women or will be. And they were the problem in the first place.

This basis is unworkable also because its roots lie in moral law, rather than civil or criminal law; and, in this pluralistic society, moral law rarely has the force of civil or criminal law. It is not that a wholly moral law is without force, but we can seldom look to the civil courts or the police for its enforcement. What force it has derives from the church, from the family and the home, from church-related schools and colleges, and to a much lesser extent from pluralistic public schools. When civil authorities enforce laws that govern personal moral behavior, we end up with the sheer chaos of Prohibition, with the general dissatisfaction accompanying efforts in New York to change the grounds for divorce (making them far too liberal for some tastes, not liberal enough for others), or with that foolishness surrounding dissemination of birth control information in Connecticut.

Persons who see in obscenity a threat to personal morality may continue efforts to have their own moral codes sanctioned by legislative bodies and enforced by civil authorities. Yet the unworkability of this basis for censorship shows itself in unsatisfactory results. It is this fact, I think, that pushes many to adhere to either or both of the other two bases. Though this is wholly conjectural, I suspect that at least part of the confusion and uncertainty that surround the other two ("outrage to public decency" and "impulse to antisocial behavior") derives from the fact that at times they are not the real issue. At bottom is the conviction that to lust after a woman is by itself a violation of the moral and ethical code.

Conjecture aside, however (and I may as easily be wrong as right), we should study the other two bases, not for their roots, but for their surface validity. Are they clear and are they operational? In deciding whether certain materials outrage public decency, whether they "go beyond customary limits of candor in describing or representing such matters," a major problem is finding the base line from which to judge. I fear that we would end up with standards that are customary for or considered desirable by the best-organized minority in the community. This standard can be identified; it often makes itself felt. That surely is not the intent behind the principle. Take the San Francisco Bay Area as a community and a case in point. In some older neighborhoods ladies hanging their clothes out to dry invariably place "underthings" either inside pillowslips or under sheets. A newcomer who hangs them out in the open is soon made to know what is proper and what is an affront. At the same time, this community is a holdout for bawdy burlesque, home of the topless go-go, fountainhead of the free sex movement.

What, in San Francisco, are the "contemporary community standards relating to the description or representation of sexual matters"?

The difficulties here showed themselves when a judge recently dismissed charges against the operators of penny arcade peep shows and a burlesque theater in the District of Columbia. The judge had earlier asked the prosecution for evidence that these shows did violate contemporary community standards, and he provided them with a continuance specifically for this purpose. They failed to provide such evidence and, finally, invited the judge to apply his own standards. He declined–rightly, I think–and dismissed the case.

If this basis is difficult, it is also dangerous, as witness an anti-obscenity initiative now gaining support in California. Reports are that it has already enough signatures to go on the November ballot. The initiative calls for seizure of all copies of any object which a public officer believes to contain obscene materials. It forbids a judge from dismissing an obscenity case. To the jury it gives full jurisdiction, including the determination of fines and punishment.

This is not to say that in public behavior there is no such thing as a clear outrage to public decency. But with books and movies it is rarely clear-cut. Having to prove a violation of community standards was a real problem for the prosecution in Washington; yet, under the circumstances, I think the judge had no choice but to dismiss the case. It is possible to sympathize with backers of the California initiative, impatient with dismissals and putting the decision to a jury which undoubtedly would apply its own standards in the absence of any other evidence. Yet it is all so muddy that, while "outrage to public decency" is an operational base, it is so unclear as to be untrustworthy.

A far more difficult issue is the contention that pornographic materials lead to what is generally called "antisocial behavior," which usually embraces not only sex crimes and perversion, but otherwise normal sexual relations between unmarried persons, which hardly seem antisocial. Sexuality is on the increase. Movies may not be better than ever, but they surely are sexier. For what he would pay to see *Mary Poppins* (which, for the record, is *not* obscene), an adolescent can buy a copy of one of the dirtiest books ever written and have enough left over for a copy of *Playboy* and a Hershey bar.

Nor is there much question about increasing promiscuity and sex crimes. One can quarrel with statistics; and longitudinal projections based on comparative statistics often deserve a quarrel. But the judgments and warnings of educated and informed men–men like Mr. Frank, who deal daily with the problem–leave little room for doubt or serious question. The youthful marriage, based almost wholly on sexual attraction, consummated before the ceremony, entered into in desperation, "blessed" with a premature first birth, and drifting toward the divorce court, is a fact.

Yet the question of causality is far from resolved. And even if there be grounds for suspecting some kind of causalty, the question of which kinds of materials are the most likely to induce such behavior is even further from resolution. (Though I doubt the relationship, I was tempted to go over to the other side when I read on Friday, July 15, 1966, the final edition of the *Chicago Tribune*, the great bulwark of morality and the strong opponent of junior college teachers who favor the reading of James Baldwin. By my morbid count, exclusive of headlines and banners, it gave 297 column inches to the mass murder of the eight student nurses in Chicago, roughly 10,300 words—not counting the captions underneath those thirty-nine pictures. There is no question in my mind; that was an obscene edition. If detailed discussion of sex leads to antisocial behavior, it was also a dangerous edition.)

There are, so far as I know, four ways to establish the validity of a proposition. One can establish validity by logic: for example, one can prove Socrates' mortality by a syllogism that begins with the premise that all men are mortal. One can establish validity by some form of the scientific method: ironically, the citizens of Athens finally proved by empirical methods that Socrates was mortal.

What happens, however, when a proposition falls outside logic and so far defies science, as does the proposition that obscene materials lead to antisocial behavior? One resort is common sense, which tells us that there must be some kind of causal connection between the two, and which also tells us many other wondrous things. A more substantial strategy is a version of the dialectic method of argument. If we cannot prove a proposition by logic or by science, and if we do not trust common sense, we marshall *all* the reasonable support we can for both sides of the proposition, choose the side with the strongest support, and then refute the other. But we do not choose and refute till we have fairly marshaled all the known support.

This strategy drives me to the negative side of the proposition. I am aware that some moralists and moral theologians contend that there is a connection—and in any dialectical process the opinions of educated and informed men must carry some weight. But many, I suspect, reason from Matthew IV:28. And they're not unanimous. (See, for example, "The Freedom to Read and Religious Problems," *ALA Bulletin*, June 1965, by Theodore Gill, President of San Francisco Theological

Seminary.) I know that certain police officials and legal experts think so, too—but not all of them, as any study of the footnotes to Mr. Frank's paper will make clear. I've read Frederick Wertham, but against him I array the responses of psychiatrists and psychologists in a New Jersey survey I'll report on below.

On the negative side I see recent reports from the Kinsey Institute, reports of a study of sex criminals' habits with the overwhelming evidence that sex criminals are in the main non-readers, persons wholly uninterested in and bored with sexy books and pictures. I'm struck by the arguments of men who have worked with juvenile delinquents, men like Dr. William Kvaraceus at Tufts University (see *ALA Bulletin* noted above), who denies any causal connection. I was impressed by the consistency with which the psychologists in Mr. Frank's own study refused to say that publication and distribution of the material would be harmful. It was the professors of literature who, outside their field of special competence, gave Mr. Frank the most damning statements in this connection—not the psychologists, whose competence was more relevant.

Recently the New Jersey Committee for the Right to Read surveyed New Jersey psychologists and psychiatrists for their reaction to the suppression of sexually oriented materials and to the supposition that such materials promote delinquency. The complete report has yet to be published, but an interim report was issued in May 1966 (*The Readers' Right*, Volume 3, No. 3). By that time, 204 had responded. Asked whether in their practice they had ever dealt with a patient whose behavior was otherwise "normal" but who was provoked into antisocial behavior by sexually oriented literature, 10 said yes, 164 said no; whether such materials might indeed reduce such behavior by providing vicarious outlets, 114 yes, 52 no; whether banning such materials would contribute to the general improvement of mental health in juveniles, 20 yes, 160 no; how state funds might best be spent to improve the situation of youth, 11 by eliminating obscenity, 186 by other means (including education, expanded mental health services, etc.).

Particularly with respect to antisocial behavior in the form of sex crimes and perversion, dialectic drives me to the negative position, my own fears and common sense notwithstanding. But one should probably contend separately with the issue of promiscuity, since the bulk of the evidence so far deals more specifically with the other antisocial acts. Here I think the statistics that point to an increase are less dependable, dealing as they do with private rather than public acts. Even so, conceding an absolute increase in promiscuity and hasty marriages concurrent with an increase in pornography, any causal relationship is disputable, and the hope for any cure through censorship is dubious. The continuing prospect of conscription since the early 1940's plus the escape hatch that marriage has offered must take some credit for the increase in early marriages between mismatched couples who might have seen the mismatch had their courtship been longer. Moreover, if Comstockery lasted roughly until 1930, there is little in the morality of the early and middle twenties to raise our confidence in censorship.

For promiscuity, like any other act, one needs at least the knowledge of how to do the act, the impulse to do it, and the opportunity to do it. If I were to have to point my finger at that industry which, itself, was singly more responsible for increasing promiscuity over the past three decades, it would be neither writing nor publishing. Knowledge of the act has been there all along. The impulse comes with adolescence, held in whatever check by a moral code and by the limits of opportunity. Far more important than any debatable increase in desire generated by obscene literature and generally increasing sexual preoccupation has been the logarithmic increase in opportunity over the past thirty years. In my own mind, the innocent villain in the piece is the automobile. If we wanted through legislation suddenly to reduce adolescent promiscuity, our hope would be in a law that prohibits any two people not married to each other from occupying the same car without the presence of a third party.

I think that, if we banned books like *Fanny Hill* and *Candy* and did nothing with respect to opportunity and propinquity, we might feel a little more virtuous, but no calculus that man could devise would measure any detectable decline in promiscuity. If we take seriously the responses of psychiatrists and psychologists in the New Jersey survey, we might also expect from this suppression some increase in sex crimes and perversion. And we would have created the machinery by which others could also ban far better books.

In mounting his case against *Fanny Hill* as being censorably obscene, Mr. Frank goes beyond the experts involved in his experiment to cite a paragraph from John Ciardi's column in *Saturday Review*. Ciardi's condemnation of the book as dirty is uncompromising and effective. Yet the paragraph that follows the one cited by Mr. Frank has also to be taken into account:

> I am not well disposed, let me say, to banning any book. I believe that parents who have reared their children in sympathy, and yet within a sense of this world as it goes, have nothing to fear from what the children read. And it is always likely—

> it seems, in fact, certain—that any statute framed to suppress pornography will be used to suppress the work of serious writers. It is, I believe, socially irresponsible to let moral indignation bring about statutes that cannot, by their nature, be responsibly phrased to cover all cases. The only consequence of such statutes is that the good will be damned with the bad—a clear affront to the legal principle that it is better for a hundred guilty persons to go free than to punish one innocent person. These, I submit, are ponderable reasons for opposing legal censorship of any sort, and I must take them to be sufficient.

So here we have some important dimensions of the current situation: a legal structure for censorship rooted at least partly in moral law that has no direct force in civil law and resting consequently on two legal principles neither of which is clear enough to be safe; we have an absolute increase in pervasive sexuality, affecting virtually every corner of our culture; we have an absolute increase in the incidence of sex crimes and acts of perversion and in promiscuity among adolescents; we have as noted above a vast increase in the opportunity for promiscuous behavior; we not only have "the pill," but as a matter of record we have parents whose daughters receive a five-dollar increase in their monthly allowance about the time they reach seventeen or eighteen years of age, with an understanding that this increase is earmarked for a particular purpose. And, so far as we can tell, the only effort society is making to hold the wave in check is to control the first sales of books and magazines with a screen so coarse that, at least for the Supreme Court, *Fanny Hill* passes through.

If it is the morality of society at large that we are concerned with, we note all the earmarks of an epidemic that is getting worse. Partly out of desperation and partly out of compromise, we go after the books. The chances that an effective ban against obscenity will stem this alarming wave are so slight that we risk giving up on morality and settling for some semblance of public decorum.

I agree in principle with the procedure and the structure that Mr. Frank suggests, but I think for a somewhat different purpose. We know full well that books are on the block. Parents who cannot clean up their children find a tempting satisfaction in cleaning up the book stalls. Knowing this, and agreeing that the police who are to enforce the law may not be endowed with or educated to the wisdom that should guide this enforcement, I should hope they would appoint panels of experts, representing at least literature and psychology, to help reach just decisions about challenged books. But, frankly, I see these censorship panels as serving a contrary function.

Ray Bradbury has written a frightening story called *Fahrenheit 451*. At 451 degrees Fahrenheit we have the tinder point of paper. And the story is set at a time in the future when society still has fireman, but their function has been changed. They are now in charge of burning books—any books, all books—because society has come to regard books as harmful morally, politically, ideologically. In a similar kind of reverse twist, I would hope that these censorship panels would have as their chief function that of saving books. Their function, as Mr. Frank puts it, is affirmative defense; but I would hope that their testimony would be virtually binding. If the literary specialists agree that there is some redeeming merit, *any* redeeming merit, in a book, and if the psychologists believe that no harm will come to the average citizen from its distribution, the book should remain in circulation.

Even so, two or three things trouble me deeply about the proposal. Regardless of other issues, he who controls the panels controls the books. As Mr. Frank has noted, if we look for one, we can find an "expert" who will testify to almost anything. I would not worry so much about Champaign-Urbana, but I would worry for a good many isolated communities where the pool of experts is not quite the same. Second, the proposal is aimed only at first sales, not at circulation. If reading obscene literature does or can harm, we have no controls here over the hardest core material involved in the experiment, since it was not sold in the first place, nor the assurance of much control over the other materials. Certainly the first sale of cigarettes has long been "controlled." Yet anyone who teaches in junior high schools knows with what limited effectiveness these controls operate.

If, on the other hand, control of first sales were effective, I would worry about other consequences. Would it not make unduly conservative those legitimate publishers who rely heavily on local sales? And would it not increase the volume of mail order sales which fall outside local control, unless the U. S. postal authorities operated on the standards of the most conservative communities? Or would Marboro have to footnote its ads to tell the residents of certain communities that they could not order certain books? And what effect would this announcement have in other communities?

In short, knowing that fuzzy laws—federal, state, and local—do call for censorship, I would approve the appointment of the panels if only because, when the panels are truly expert and appointed fairly, a book—even *Fanny Hill*—stands a much better chance of survival. The fewer restrictions that are placed on first sales, the less we have to worry about covert sales and outright bootlegging.

I am at heart a moral man, and I worry as Mr. Frank does about what is happening. What also worries me is that books are the target, but they are hardly the cause. It is indeed an epidemic. The question is, what do we do about epidemics? If we're concerned about bubonic plague, we can and should make every effort to destroy the rats that are the principal carrier. If we're worried about typhoid, we can and should try to stamp out the typhus bacillus. At the same time, we also know that we have *not* stamped out all the carriers of either disease. Our great hope against epidemics has not been in stamping out all the carriers of the disease. It has been in early identification and specific treatment of the sick and in massive inoculation of the population. Our protection lies not in sterilizing the world we live in, but in making the population immune to its most lethal dangers. Except in rare and specific cases, infants are not isolated from the world. They are given shots which immunize them to the world. Anyone who has read *The Silent Spring* knows the danger in massive extermination and sterilization. It is not, then, a germ-free world we seek; it is a strong, healthy population.

In the creation of a strong, healthy population the English department can make a major contribution. Its failure to do so thus far is a strong indictment against it. Here I take my text briefly from a paper by a young Jesuit, Father William O'Malley, who discusses "Teaching Dirty Books in the High School." Father O'Malley acknowledges simply that students going through high school should grow in literary sophistication and will, whether we like it or not, mature in sexual sophistication.

Any English department which rests its sequence in the study of the novel on a procession from *Great Expectations* to *Silas Marner* to *Tale of Two Cities* to *House of Seven Gables* (avoiding, heaven help us, *The Scarlet Letter*) to *Pride and Prejudice* is aware of the first scale of growth but conveniently blind to the second. So, too, is a department whose whole treatment of drama consists of comfortably edited plays by Shakespeare. So, too, is a department which for outside reading relies wholly on required reading lists and restricts the lists to those works which without incident can be required of all students. So, too, is a department which pretends to teach the students about the lives of the writers as well as their works, but which does so in a fashion that makes all the English poets seem like nice young men.

As a nun pointed out in her comments as an independent reader for the manuscript of NCTE's *The Students' Right to Read*, the harm in

Catcher in the Rye is not in the reading of it (and we must assume most adolescents will read it). The harm comes from reading it in isolation without the chance to discuss it with other students and without a sensitive teacher or another adult who can make clear that it is not a dirty book, even though it repeats four times one of the most tabu (and, incidentally, most widely used) words in English, and even though it includes a vivid scene with a prostitute. It is at heart a book which pleads for compassion in an age that can surely use compassion, but for some students this point comes out only in discussion.

A second dimension of our failure (and our potential) is the relationship which we regard as proper and which we seek to establish between the English faculty and the parents. Our comfort is full when we have adopted a book selection procedure that removes much of the risk of parental interference. When we grudgingly provide a program for that one PTA meeting per year which falls to the English department, we use it to prove that we are still teaching grammar, even if we call it "linguistics," or to show parents how hard it is to mark a composition. Why do we never brave openly the issue of book selection and the folly of a germ-free library in a germ-ridden world?

Our third mistake is in our defense of literature to promise desirable but wholly unjustified outcomes. These claims Mr. Frank rightly turns upon us when he urges that, if reading books can make people good, can it not also make them bad? Although it is a "nice" thing to say, no one can argue with any evidence that reading certain books makes children or adolescents or adults "good." Any father who reads to his his little girl "Red Riding Hood" in the hope that it will discourage her from talking to strangers distorts the whole issue. The best reason for reading this story to his child is to give her that delicious feeling of being scared and safe at the same time. It is for the experience that we teach literature, not for the specific outcome. More mature literature we teach partly to show adolescents other ways of ordering experience and viewing the universe, in the confidence that one difference between successful people and unsuccessful people, between virtuous people and evil people, between happy people and miserable people, is that the former know more ways to order the universe and have, consequently, more alternatives to choose among.

We know from psychology that any response is the result not just of a stimulus, but of the interaction between the stimulus and the organism. Our goal in literature is not to produce "responses," in the sense of overt behavior. Rather, it is modestly but importantly to make the organism more complex and hence to increase the possible ranges of responses to any particular stimulus. We also know that most of the people who commit "antisocial" acts are not avid readers of pornography; most, in fact, are virtually non-readers. Certainly, they are not *book* readers. Specifically, I would bet, on nothing stronger than a hunch, that most sex criminals have not read *Fanny Hill*; and that most of those who have read *Fanny Hill* are not sex offenders.

Ironically, *Fanny Hill* is not the only book the Supreme Court has cleared recently. In July 1963 it also cleared the Bible, as long as we do not tie it to devotional exercise or sectarian instruction. One of the most recent versions of the Bible in this ecumenical age is the work largely of Protestant scholars, but it carries the imprimatur of Cardinal Cushing; and it includes not only those books which the Protestant churches regard as inspired, but also those which they regard as apocryphal, but which Catholics regard as inspired. Consequently, it contains not only the Song of Songs, but that lurid story of Susanna and the Elders.

Here is as much as we can hope for in the moral society we strive to foster: not that readers will be protected from the vivid account of voyeurism in the story of Susanna, not that they will be insulated from such sex imagery as that which pervades the Song of Songs, but the quiet confidence that anyone who reads all or much of the Bible will be prepared to respond richly to these two works which, taken out of context, might well be objects of criticism—the one for its subject matter, the other for stepping well beyond the customary limits of detail.

All we can be certain of, and it offers little comfort, is that the framework for censorship established by the Supreme Court can and will be adapted for regional and local purposes, but that however strict controls on first sales are, obscene materials will still circulate in the shadows, and much that is heavily sexual in its orientation will never be touched by the law. The journeyman teacher in the school and the scholar-critic have then two challenges: to protect the books through public action and to strengthen the readers through far more imaginative and substantial programs than many schools now offer. In short, they must devise programs in literature and programs of public action that take into account the maturing nature of adolescents, the broad world of accessible reading which sifts through the coarse screen constructed by the Supreme Court, and the world itself—programs which do not rest on the hope of a germ-free environment in a germ-ridden world.

BIOGRAPHICAL NOTES

John P. Frank, whose legal education was divided between the University of Wisconsin and Yale University, served as a law clerk to Justice Hugo Black. He was also a law faculty member at Indiana and Yale Universities. He has written and edited several works reflecting his specialization in constitutional law, including *Cases and Materials on Constitutional Law; Marble Palace, The Supreme Court in American Life;* and *The Warren Court*. The First Amendment has particularly drawn his attention. Now in private practice in Phoenix, he is a member of a United States Supreme Court review committee.

Robert F. Hogan, now Associate Executive Secretary of the National Council of Teachers of English, will become Executive Secretary in 1968. Educated at the Universities of California and Illinois, he has taught English at both high school and college levels. He was Assistant Director of the Commission on English of the College Entrance Examination Board. Besides publishing articles in professional journals, he edited *The National Interest and the Continuing Education of Teachers of English* and a teaching edition of Koestler's *Darkness at Noon*.